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Lethal Injection Secrecy and Eighth Amendment Due Process

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LETHAL INJECTION SECRECY AND EIGHTH AMENDMENT DUE PROCESS

ERIC BERGER*

Abstract: The U.S. Supreme Court has held that death row inmates possess an Eighth Amendment right protecting them against execution methods posing a substantial risk of serious harm. Despite the clear existence of this liberty interest, lower federal courts have repeatedly denied inmates' requests to know important details of the lethal injection procedure the state plans to use. This Article argues that the Eighth Amendment includes an implicit due process right to know such information about the state's planned method of execution. Without this information, inmates cannot protect their Eighth Amendment right against an excruciating execution, because the state can conceal crucial details of its execution procedure, effectively insulating it from judicial review. As in other constitutional contexts, then, due process norms require that the government provide people with information necessary to protect their other constitutional rights. These norms similarly require courts, rather than administrative agencies, to judge the execution procedure's constitutionality. Judicial recognition of this due process right would both protect Eighth Amendment values and also encourage states to make their execution procedures more transparent and less dangerous. Just as importantly, judicial recognition would also discourage secretive governmental practices more generally, thereby promoting openness and fair process as important democratic values.

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INTRODUCTION

Michael Taylor's execution date was just days away in February 2014 when he won what appeared to be a significant legal victory. Taylor, a death row inmate in Missouri, had sued the Apothecary Shoppe, an Oklahoma compounding pharmacy that had allegedly contracted to supply Missouri with compounded pentobarbital for use in its lethal injection procedure. Taylor's lawyers alleged that "compounding injectable pentobarbital outside an FDA-approved facility poses a substantial risk that the purity, efficacy, and sterility of the drug will be compromised such that a tortuous death will result."¹ The allegation was hardly fanciful. On the contrary, experts had identified the dangers of compounded pentobarbital, and recent executions using that drug in other states had gone awry.² Perhaps recognizing that litigation may be expensive and attract bad publicity, the Apothecary Shoppe settled, agreeing not to provide drugs to Missouri.³

Taylor's victory did not last long. Shortly after the settlement, Missouri Governor Jay Nixon announced that the State would proceed with Taylor's execution anyway.⁴ Nixon refused to specify the drugs his State would use, but he cryptically suggested that Missouri had access to lethal chemicals from another source.⁵ Taylor, who had filed suit against the State as well, moved to stay his execution on the grounds that Missouri could not substitute a new drug at the last minute.⁶ The next day, Missouri disclosed that it still planned to use pentobarbital in Taylor's execution⁷ but again refused to disclose the drug's source.⁸

Viewed in the abstract, Taylor still seemed to have viable Eighth Amendment and due process arguments. Missouri had acknowledged that it planned to use pentobarbital, but the only company manufacturing injectable pentobarbital available in the United States had prohibited sale of its drugs for use in

¹ Plaintiff's Memorandum in Support of Temporary Restraining Order at 1, *Taylor v. Apothecary Shoppe*, No. 14-CV-063-TCK-TLW (N.D. Ok. Feb. 18, 2014).

² See *id.*; *infra* notes 103–121 and accompanying text (discussing the dangers of compounded pentobarbital and gruesome executions using that drug).

³ See Assoc. Press, *Tulsa Pharmacy Agrees Not to Provide Execution Drug*, CBSNEWS.COM (Feb. 17, 2014), <http://www.cbsnews.com/news/oklahoma-pharmacy-agrees-not-to-provide-drug-for-execution/>, archived at <http://perma.cc/U8SC-YTzt>.

⁴ See Tony Rizzo & Jason Hancock, *Missouri Execution of Michael Taylor Remains on Track, Governor Says*, KANSAS CITY STAR (Feb. 18, 2014), <http://www.kansascity.com/2014/02/18/4831828/missouri-execution-on-track-governor.html>, archived at <http://perma.cc/7537-EW3Y>.

⁵ See *id.*

⁶ See Plaintiff Michael Taylor's Motion for Stay of Execution Based on Absence of Lawful Means of Execution at 2, *Zink v. Lombardi*, No. 12-4209-CV-C-BP (W.D. Mo. Feb. 18, 2014).

⁷ See Suggestions in Opposition to Plaintiff Taylor's Motion for Stay of Execution at 2, *Zink*, No. 12-4209-CV-C-BP [hereinafter *Zink* Opposition Suggestions].

⁸ See *id.*

executions.⁹ Because injectable pentobarbital's shelf life is limited, Missouri almost certainly planned to use compounded pentobarbital, which, at least arguably, creates serious risks that manufactured pentobarbital does not.¹⁰ Given these concerns and eyewitness accounts of problematic executions using compounded pentobarbital elsewhere, Taylor had a strong argument that the State should disclose its execution procedure details for closer inspection. Perhaps further inquiry would demonstrate the "safety" of Missouri's drugs and procedures,¹¹ but Taylor had raised colorable claims that the State's planned execution created a substantial risk of serious pain in violation of his Eighth Amendment right against "cruel and unusual punishment."¹²

The courts rejected Taylor's arguments. The federal district court in Missouri denied his motions, the U.S. Court of Appeals for the Eighth Circuit affirmed, and the U.S. Supreme Court denied certiorari and the application for a stay of execution.¹³ Collectively, these orders prevented Taylor from learning crucial details about Missouri's execution procedure. While the Eighth Circuit's Judge Bye did issue a stinging dissent, arguing that a stay should be granted so that Taylor "be allowed access to information and testing so he could determine whether his constitutional rights were to be violated at the time of his death,"¹⁴ the two appellate courts rejected Taylor's contentions

⁹ See Press Release, Lundbeck, *Lundbeck Divests Several Products in the US as Part of Long-Term Business Strategy* (Dec. 22, 2011), <http://investor.lundbeck.com/releasedetail.cfm?ReleaseID=635094>, archived at <http://perma.cc/6WAH-9S4H>.

¹⁰ See Assoc. Press, *Missouri Officials Declined Comment on Execution Supply*, NEWS-LEADER.COM (Feb. 19, 2014), <http://www.news-leader.com/article/20140219/NEWS11/302190090/Missouri-officials-declined-comment-on-execution-supply>, archived at <http://perma.cc/H75V-RNWJ>; *infra* notes 103–121 and accompanying text.

¹¹ A "safe" execution or drug in the lethal injection context is one that does not pose a substantial risk of serious pain, thereby complying with the Eighth Amendment standard announced by the U.S. Supreme Court in *Baze v. Rees*. See 553 U.S. 35, 52 (2008) (plurality opinion). Obviously, to the extent the drugs are used to cause the death of a human being, they are not "safe" in the common sense of the word.

¹² See U.S. CONST. amend. VIII. This Article focuses on Eighth Amendment method-of-execution claims. In different contexts, the Eighth Amendment protects against, *inter alia*, inhumane prison conditions, sentences disproportionately harsh to the crime committed, and particular sentences for certain classes of criminal defendants, such as juveniles or the mentally disabled. See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407, 407 (2008) (invalidating death penalty for people whose crimes did not result in death of victim); *Roper v. Simons*, 543 U.S. 551, 560 (2005) (invalidating death penalty for people who committed their crimes as juveniles); *Hutto v. Finney*, 437 U.S. 678, 679 (1978) (considering constitutionality of prison conditions).

¹³ See *Taylor v. Lombardi*, 132 S. Ct. 1375, 1375 (2014); *Taylor v. Bowersox*, 14-1403, slip op. at 2 (8th Cir. Feb. 25, 2014); *Zink*, No. 12-04209-CV-C-BP, slip op. at 1.

¹⁴ See *Bowersox*, 14-1403, slip op. at 4 (Bye, J., dissenting) (disagreeing with order denying petition for rehearing en banc).

without even explaining their rulings.¹⁵ (Justice Ginsburg, joined by Justices Sotomayor and Kagan, did issue a brief dissent saying that she would have granted the stay for the reasons “well stated by Judge Bye.”)¹⁶ On February 26, 2014, Missouri executed Michael Taylor.

The State and courts’ approaches to Taylor’s case were hardly anomalous. On the contrary, in recent years, states have become increasingly secretive about their lethal injection procedures.¹⁷ Although states typically make some information available, they often withhold vital details that directly affect the likelihood that the inmate will suffer excruciating pain. Courts, for their part, often turn a blind eye to these state practices, usually rejecting inmates’ requests to learn this crucial information.¹⁸

These state practices and judicial responses are deeply entrenched, but they are also wrong. Indeed, courts in these cases have repeatedly misunderstood both the law and the facts. Judicial sanction of lethal injection secrecy ignores important due process principles and abdicates the courts’ duty to ensure that states do not violate the Constitution. Courts also ignore a history of botched executions that belie their common assumption that lethal injection is unproblematic. To be sure, some execution procedures, upon closer examination, may be safe and constitutional, but some certainly are not, and courts have no way of distinguishing the safe from the dangerous without inquiring into the details of the procedure. To this extent, courts have repeatedly blessed risky execution procedures without bothering to examine them.

This Article argues that courts confronted with Eighth Amendment challenges to lethal injection procedures should require states to provide inmate plaintiffs with details bearing on the risk that they will suffer serious pain.¹⁹ As

¹⁵ See *Taylor*, 132 S. Ct. at 1375; *Bowersox*, 14-1403 at *1 (majority opinion). To be fair, the Supreme Court usually does not comment when it denies requests for stays of execution and petitions for certiorari, though when one or more Justices dissent, perhaps it should.

¹⁶ *Taylor*, 132 S. Ct. at 1375.

¹⁷ See Deborah W. Denno, *Lethal Injection Chaos Post-Baze*, 102 GEO. L.J. 1331, 1376 (2014).

¹⁸ See *Taylor*, 132 S. Ct. at 1375; *Bowersox*, 14-1403 at *2; *infra* notes 175–205 and accompanying text.

¹⁹ Inmates potentially may gain access to execution procedures under various legal theories. For example, in some states, inmates may seek the information under a state Freedom of Information Act (FOIA), though many states specifically exempt execution procedures from their state FOIAs. See *infra* notes 147–152 and accompanying text. Some inmates have also argued that the First Amendment provides them a right of access to the information and a right to petition the government for a redress of grievance that can only be vindicated by disclosure of sensitive information. See *Wood v. Ryan*, No. 14-16310, slip op. at 25 (9th Cir. July 19, 2014) (granting a preliminary injunction because, *inter alia*, the plaintiff has raised “serious questions” as to the “merits of his First Amendment claim”), *rev’d*, No. 14-5323, 2014 WL 3593088, at *1 (U.S. July 22, 2014); *Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868, 873 (9th Cir. 2002); *Schad v. Brewer*, CV-13-2001-PHX-ROS, 2013 WL 5551668, at *9 (D. Ariz. Oct. 7, 2013) (holding that plaintiffs were likely to succeed in argument that state’s deliberate concealment of information about the lethal-injection drugs violated

an initial matter, civil plaintiffs enjoy broad access to discovery, with which state privilege laws cannot interfere in federal question cases.²⁰ From this perspective, inmates bringing Eighth Amendment lethal injection challenges under 42 U.S.C. § 1983 are entitled to information about the state's execution procedures under the ordinary rules of civil discovery without even having to assert a due process claim.

Due process arguments make this right to discovery even stronger. Death row inmates unquestionably possess an Eighth Amendment right protecting them against methods of execution that create a substantial risk of serious harm.²¹ A state, then, violates the Constitution when it employs an execution procedure creating such risk. This right, however, only has force if courts enforce it *ex-ante*—that is, if courts enjoin dangerous execution procedures and require states to adopt safer ones *before* executing an inmate.²² Nevertheless, many states, like Missouri, typically conceal crucial details of their execution procedures from inmates as well as the public, thereby effectively preventing inmates from safeguarding their Eighth Amendment rights.²³ This secrecy not only violates the condemned's constitutional rights but also heightens the risk that executions will cause excruciating pain. Indeed, in recent years, there have been several instances of botched executions, often involving grisly accounts of inmates convulsing or crying out from the gurney.²⁴

Without access to information about execution protocols, the inmate's Eighth Amendment protection against unconstitutional executions evaporates, because the state can conceal details of its execution procedure, thereby insulating it from judicial review. To safeguard the inmate's Eighth Amendment right, then, courts should require states to disclose all material details of their execution procedures.²⁵ This right likewise should encompass a right to know the state's last-minute material changes to its procedure.

their First Amendment right of access to governmental proceedings); Nathaniel A.W. Crider, *What You Don't Know Will Kill You: A First Amendment Challenge to Lethal Injection Secrecy*, COLUM. J. L. & SOC. PROB. (manuscript at 3) (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2425017, archived at <http://perma.cc/4LC7-LB38> (arguing that the press has a qualified First Amendment right of access to information about lethal injection drugs). Finally, both state and federal governments are contemplating new regulations on compounding pharmacies that may require "an unprecedented degree of transparency" from death penalty states. See Denno, *supra* note 17, at 1376. This Article focuses on due process arguments.

²⁰ See FED. R. EVID. 501; FED. R. CIV. P. 26; *infra* 206–239 and accompanying text.

²¹ See *Baze*, 553 U.S. at 52.

²² These injunctions can be tailored so as not to intrude unnecessarily on state prerogatives. See Eric Berger, *Lethal Injection and the Problem of Constitutional Remedies*, 27 YALE L. & POL'Y REV. 259, 315–25 (2009); *infra* notes 356–419 and accompanying text.

²³ See, e.g., MO. STAT. ANN. § 546.270(2)–(3) (West 2007); *infra* notes 147–152 and accompanying text.

²⁴ See *infra* notes 117–138 and accompanying text.

²⁵ See *infra* notes 206–355 and accompanying text.

The question of whether inmates possess a constitutional right to know how they will be executed has recurred frequently in the lower federal courts and will continue to arise. The issue has received prominent attention in the mainstream media²⁶ and even from Stephen Colbert.²⁷ Nevertheless, the U.S. Supreme Court has ducked the issue repeatedly, most recently denying certiorari in a pair of cases in April 2014.²⁸ The legal academy also has neglected to examine the issue so far. Deborah Denno has discussed state secrecy in her excellent, comprehensive study of recent developments in lethal injection,²⁹ but scholars have not yet examined whether state secrecy in lethal injection violates inmates' due process rights.

The question, however, is an important one that deserves more careful exploration. To the extent lower courts have addressed the issue, they usually reject the asserted right to information without adequately wrestling with the constitutional norms involved.³⁰ Indeed, courts' analyses to date emphasize only the *state's* interests in proceeding with its execution and shortchange the inmate's constitutional interests.

Were courts to consider the question more carefully, they would see that the Supreme Court has emphasized that due process and basic fairness demand that litigants receive notice of the state's plans for them and an opportunity to challenge those plans.³¹ The Court has similarly recognized a right to information where an individual needs such information to protect a threatened constitutional right. The Court has also recognized that protection of a substantive right often depends not only on the contours of the right itself but also on whether the government's procedures are sufficiently sensitive to the right in question.³²

Nonetheless, concerns driving lower courts' rejection of these arguments are understandable. For instance, courts often worry that increased scrutiny of

²⁶ See, e.g., Adam Liptak, *Deciding If Death Row Inmates Get to Know How They'll Be Killed*, N.Y. TIMES, Mar. 10, 2014, <http://www.nytimes.com/2014/03/11/us/deciding-if-death-row-inmates-get-to-know-how-theyll-be-killed.html?hp>, archived at <http://perma.cc/9YJQ-GNXX>.

²⁷ See *The Colbert Report: The Word—Silent But Deadly* (Comedy Central television broadcast Apr. 2, 2014), available at <http://thecolbertreport.cc.com/videos/o639ag/the-word—silent-but-deadly>, archived at <http://perma.cc/D7XX-VLBE>.

²⁸ See *In re Lombardi*, 741 F.3d 888, 888 (8th Cir. 2014) (en banc), cert. denied, 134 S. Ct. 1790 (Apr. 7, 2014), reh'g denied, 741 F.3d 903 (8th Cir. 2014); *Sepulvado v. Jindal*, 729 F.3d 413, 418 (5th Cir. 2013), cert. denied, 134 S. Ct. 1789 (Apr. 7, 2014).

²⁹ See Denno, *supra* note 17, at 1376–81.

³⁰ See, e.g., *In re Lombardi*, 741 F.3d at 895–98; *Sepulvado*, 729 F.3d at 418–21; *Valle v. Singer*, 655 F.3d 1223, 1236–38 n.13 (11th Cir. 2011); *Beaty v. Brewer*, 791 F. Supp. 2d 678, 685–86 (D. Ariz. 2011), *aff'd*, 649 F.3d 1071 (9th Cir. 2011); *Powell v. Thomas*, 784 F. Supp. 2d 1270, 1282–83 (M.D. Ala. 2011).

³¹ See *infra* notes 240–291 and accompanying text.

³² See *infra* notes 292–355 and accompanying text.

lethal injection procedures may unmask the identities of the execution teams. Courts similarly worry that examination of the drug sources will pressure pharmacies to stop supplying chemicals used in executions. These concerns reflect legitimate state interests,³³ but they also overstate the problem. Courts are fully capable of fashioning procedures, such as neutral chemical testing, that grant inmates evidence needed to evaluate the safety of execution procedures while guarding against public dissemination of sensitive information, such as executioner and pharmacy identities.³⁴

Importantly, judicial recognition of an Eighth Amendment due process right is not only consistent with basic constitutional principles but would also result in safer executions.³⁵ States often create their lethal injection procedures in secret without oversight or transparency.³⁶ Little incentive therefore exists for states to ensure that executions do not cause pain, especially when they can either conceal an inmate's pain (through the use of a paralytic in the three-drug protocol) or argue that apparent pain is not what it seems.³⁷ The result can be execution procedures that create far more risk of pain than they should. In fact, recent botched executions may have been avoidable had the state disclosed important details.³⁸

Beyond the execution procedures themselves, these cases also implicate more fundamental notions of good governance.³⁹ When state officials operate behind closed doors and are accountable neither to the public nor to elected officials, they effectively act without democratic legitimacy. This lack of accountability is troubling, but it is perhaps justifiable where administrative agents possess an expertise that makes them uniquely suited to handle sensitive matters. When it comes to lethal injection, however, responsible state officials often lack not only political accountability, but also a basic understanding of the drugs and their risks.⁴⁰ Far from deserving judicial deference, these

³³ Although death penalty opponents may object that capital punishment should not constitute a legitimate state interest, the constitutionality of the death penalty *per se* is not at issue in these cases. *Cf. Gregg v. Georgia*, 428 U.S. 153, 206–07 (1976) (ending the moratorium on capital punishment imposed by *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (*per curiam*)). Indeed, by stipulating that the government may not take life without due process of law, the Constitution implies the theoretical legitimacy of capital punishment. *See* U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law”); U.S. CONST. amend. XIV (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law”).

³⁴ *See infra* notes 357–384 and accompanying text.

³⁵ *See infra* notes 457–485 and accompanying text.

³⁶ *See infra* notes 141–174 and accompany text.

³⁷ *See infra* notes 50–174 and accompany text.

³⁸ *See infra* notes 457–485 and accompanying text.

³⁹ *See infra* notes 486–519 and accompanying text.

⁴⁰ *See* Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2038–40, 2082 (2011).

kinds of governmental actions are precisely the kinds that warrant closer judicial scrutiny.⁴¹ Courts, however, have effectively turned a blind eye to state practices, thereby letting these political process failures fester.

Justice Felix J. Frankfurter once noted that “[t]he history of American freedom is, in no small measure, the history of procedure.”⁴² From this perspective, courts’ repeated deference to even the most secretive and suspicious practices should concern not just opponents of capital punishment, but all of us. Society has an interest in knowing whether the government abides by the Constitution when it carries out its most solemn task. To this extent, courts should recognize that lethal injection cases implicate core American norms, including fair process and transparent, accountable government.⁴³

Part I of this Article opens with a brief history of lethal injection in the United States, tracking the development of the three-drug protocol and the eventual shift to a one-drug protocol in several states, including the recent turn to drugs produced by compounding pharmacies.⁴⁴ In so doing, it highlights the dangers of the states’ procedures and discusses the states’ often inadequate efforts to deal with such dangers. Part I then examines state secrecy in lethal injection practices and judicial sanction of that secrecy.⁴⁵

Part II opens by explaining that inmate plaintiffs should be permitted discovery into the details of lethal injection procedures under Federal Rule of Procedure 26(b).⁴⁶ Beyond the right to ordinary discovery, inmates’ Eighth Amendment right also should encompass a due process right to know the method by which the state plans to execute them. Indeed, the Supreme Court has insisted on similar rights to information and fair process in a variety of other constitutional cases implicating different individual rights. Although states, admittedly, have interests that may sometimes be frustrated by the recognition of this right, those interests can often be accommodated by carefully crafted judicial procedures.

Part III explores the implications of an Eighth Amendment due process right in the legal injection context and argues that the recognition of such a right will result in safer executions.⁴⁷ Perhaps even more importantly, such recognition will help discourage the kinds of political process failures that often persist in the execution setting.

⁴¹ See *id.*

⁴² *Malinski v. New York*, 324 U.S. 401, 414 (1945).

⁴³ See *infra* notes 240–270, 486–519 and accompanying text.

⁴⁴ See *infra* notes 48–140 and accompanying text.

⁴⁵ See *infra* notes 141–205 and accompanying text.

⁴⁶ See *infra* notes 206–439 and accompanying text.

⁴⁷ See *infra* notes 457–519 and accompanying text.

I. LETHAL INJECTION SECRECY

This Part describes the evolution of lethal injection procedures and judicial responses to Eighth Amendment challenges to those procedures. Section A briefly recounts the history of lethal injection and its dangers. Section B explains states' efforts to keep their lethal injection procedures secret. Section C discusses how courts tend to condone such efforts.

A. A Concise History of Lethal Injection and Its Dangers

1. Lethal Injection from 1977–2008

Execution procedures in the United States have changed through the decades. Partially because the Supreme Court has interpreted the Eighth Amendment to bar punishments “incompatible with the ‘evolving standards of decency that mark the progress of a maturing society,’”⁴⁸ methods of execution once widely accepted have since been largely abandoned. As the Court has recounted, “[t]he firing squad, hanging, the electric chair, and the gas chamber have each in turn given way to more humane methods, culminating in today’s consensus on lethal injection.”⁴⁹

Lethal injection procedures themselves have also changed, especially recently. In 1977, Oklahoma became the first state to adopt lethal injection.⁵⁰ It designed a three-drug protocol consisting of thiopental, an ultra-short-acting barbiturate anesthetic; pancuronium bromide, a paralytic inhibiting muscle movement; and potassium chloride, which induces cardiac arrest.⁵¹ Over the next twenty-five years, thirty-seven states followed Oklahoma’s lead and adopted this three-drug protocol.⁵² They did so, however, without conducting their own evaluation of the procedure.⁵³ Instead, because it was easier to copy another state’s procedure than to design a new one, state officials mimicked Oklahoma’s approach without actually examining its benefits and risks.⁵⁴

⁴⁸ *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

⁴⁹ *Baze*, 553 U.S. at 62 (plurality opinion).

⁵⁰ Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 65 (2007).

⁵¹ See Mark Dershwitz & Thomas K. Henthorn, *The Pharmacokinetics and Pharmacodynamics of Thiopental as Used in Lethal Injection*, 35 FORDHAM URB. L.J. 931, 931 n.2 (2008).

⁵² See Berger, *supra* note 22, at 302; Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocuting and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 90–120 (2002).

⁵³ See Berger, *supra* note 22, at 302; Denno, *supra* note 50, at 70–75; Teresa A. Zimmers & Leonidas G. Koniaris, *Peer-Reviewed Studies Identifying Problems in the Design and Implementation of Lethal Injection for Execution*, 35 FORDHAM URB. L.J. 919, 921 (2008).

⁵⁴ See Berger, *supra* note 22, at 302; Denno, *supra* note 52, at 90–120.

This three-drug procedure, however, created serious risks of excruciating pain. It is undisputed that potassium chloride causes agonizing pain as it burns its way through the veins to the heart.⁵⁵ It is furthermore undisputed that pancuronium bromide masks such pain.⁵⁶ Because pancuronium bromide also paralyzes the diaphragm, it can also cause the terrifying sensation of suffocation.⁵⁷ The constitutionality of the three-drug procedure therefore depends primarily on whether the first drug, the anesthetic, takes proper effect.⁵⁸ When it does, the inmate is fully anesthetized within two-and-a-half minutes. If it does not, the paralyzed inmate may lie seemingly peacefully while experiencing the dual agony of suffocation and intense burning throughout his body.⁵⁹

The three-drug protocol became the subject of numerous lawsuits, contending that states' procedures created too great a risk that the inmate would suffer an excruciating death in violation of the Eighth Amendment.⁶⁰ These suits necessarily inquired into the particulars of each state's procedure, rather than the merits of the three-drug protocol in the abstract.⁶¹ Because the safety of the procedure hinged on the successful delivery of thiopental, these cases often turned on whether the state took adequate precautions to ensure that the inmate was, in fact, anesthetized before the delivery of the second and third drugs.

It turned out that the states were not always competent. For example, a doctor who ran Missouri's procedure admitted that he was dyslexic and could not say how much anesthetic he mixed.⁶² Other states had difficulty placing the catheter correctly in the inmate's veins, thus causing infiltration, the process by which drugs spill into the tissue surrounding the vein. Infiltration appears to have caused Florida's excruciating execution of Angel Diaz, who lay writhing

⁵⁵ See *Harbison v. Little*, 511 F. Supp. 2d 872, 883 (M.D. Tenn. 2007); Dershwitz & Henthorn, *supra* note 51, at 931.

⁵⁶ *Harbison*, 511 F. Supp. 2d at 883–84; Suzanne C. Beyea, *Addressing the Trauma of Anesthesia Awareness*, 81 AORN J. 603, 603–05 (2005).

⁵⁷ See *Baze*, 553 U.S. at 55; *Harbison*, 511 F. Supp. 2d at 883–84; Beyea, *supra* note 56, at 603–05; Clare Wilson, *Surgery Patients Report Waking up during Surgery but Unable to Let Doctors know*, WASH. POST, Oct. 6, 2014, http://www.washingtonpost.com/national/health-science/surgery-patients-report-waking-up-during-surgery-but-unable-to-let-doctors-know/2014/10/06/56ecec8a-3a84-11e4-8601-97ba88884ffd_story.html (summarizing study detailing terrifying experience of awakening while paralyzed).

⁵⁸ See Ty Alper, *Anesthetizing the Public Conscience: Lethal Injection and Animal Euthanasia*, 35 *FORD. URB. L.J.* 817, 818–20 (2008).

⁵⁹ Henthorn Expert Report ¶ 24, *Taylor v. Crawford*, No. 05-4173 (W.D. Mo. June 26, 2006); Dershwitz & Henthorn, *supra* note 51, at 933–36.

⁶⁰ See, e.g., *Harbison*, 511 F. Supp. 2d at 872; *Taylor*, 2006 WL 1779035 at *1; *Morales v. Hickman*, 415 F. Supp. 2d 1037, 1048 (2006).

⁶¹ See Berger, *supra* note 22, at 266.

⁶² See *Taylor*, 2006 WL 1779035, at *7; Dr. John Doe Deposition. at 20–25, *Taylor*, No. 05-4173 [hereinafter *Doe Deposition*].

and gasping on the gurney for thirty-four minutes before dying.⁶³ A doctor subsequently described the chemical burns on Diaz's arm as "the kind of injury we see when a kid has fallen in a campfire or set his arm on fire."⁶⁴ In still other states, the complicated systems of remote drug administration prevented officials from knowing whether an inmate was properly anesthetized before the delivery of the second and third drugs.⁶⁵

The U.S. Supreme Court in 2008 considered the constitutionality of Kentucky's three-drug protocol in *Baze v. Rees*.⁶⁶ *Baze* was, in many ways, a strange test case because Kentucky's lethal injection procedure was among the more carefully designed.⁶⁷ For instance, Kentucky took various precautionary measures absent in other states, such as using a phlebotomist⁶⁸ to insert the catheters, requiring wardens to remain in the execution chamber with the prisoner to watch for problems with the intravenous ("IV") lines,⁶⁹ and requiring its team to participate in at least ten practice sessions per year.⁷⁰ Moreover, the Kentucky plaintiff's discovery into the details of the procedure had been extremely limited, so his legal team was unlikely to identify problems that may have existed.⁷¹

Given *Baze*'s sparse record, it was unsurprising that the Court upheld the Kentucky protocol.⁷² Due to the limited record, however, the Court's decision did not imply the validity of three-drug procedures in other states.⁷³ *Baze* did, however, attempt to set forth the substantive standard under which future Eighth Amendment method-of-execution claims would be considered.⁷⁴ The

⁶³ See FLORIDA GOVERNOR'S COMM'N ON ADMIN. OF LETHAL INJECTION, FINAL REPORT WITH FINDINGS AND RECOMMENDATIONS 8 (2007) (finding "[f]ailure of the training of the [Florida] execution team members"); Phil Long & Marc Caputo, *Lethal Injection Takes 34 Minutes to Kill Inmate*, MIAMI HERALD, Dec. 14, 2006, at 5B.

⁶⁴ Ben Crair, *Photos from a Botched Execution*, NEW REPUBLIC, May 29, 2014 <http://www.newrepublic.com/article/117898/lethal-injection-photos-angel-diazs-botched-execution-florida>, archived at <http://perma.cc/E3KR-YH5C>.

⁶⁵ See *Harbison*, 511 F. Supp. 2d at 889 (describing difficulties of remote administration); *Morales v. Tilton*, 465 F. Supp. 2d 972, 979–80 (N.D. Cal. 2006) (same); *Berger*, *supra* note 22, at 271–72.

⁶⁶ See *Baze*, 553 U.S. at 35.

⁶⁷ See *Berger*, *supra* note 22, at 279 n.102.

⁶⁸ A phlebotomist is an individual trained to draw blood and insert catheters into veins.

⁶⁹ IV lines are plastic tubes that run from the bottle or bag of medicine into a catheter placed in a vein in the body. See American Cancer Society, *Tubes and IV Lines*, archived at <http://www.cancer.org/treatment/treatmentsandsideeffects/physicalsideeffects/dealingwithsymptomsathome/caring-for-the-patient-with-cancer-at-home-tubes-and-iv-lines>, archived at <http://perma.cc/PC65-Z2P2>.

⁷⁰ See *Baze*, 553 U.S. at 53–55; *Berger*, *supra* note 22, at 274.

⁷¹ See *Berger*, *supra* note 22, at 274, 279.

⁷² See *Baze*, 553 U.S. at 63; *Berger*, *supra* note 22, at 274, 279.

⁷³ See *Berger*, *supra* note 22, at 274–79.

⁷⁴ See *Baze*, 553 U.S. at 52. Although Chief Justice Roberts wrote only for himself, Justice Kennedy, and Justice Alito, his opinion constituted the narrowest grounds supporting the judgment and therefore is treated as the holding of the court. See *Marks v. United States*, 430 U.S. 188, 193 (1977).

plurality opinion explained that to make out a successful Eighth Amendment method-of-execution challenge, the plaintiff must establish that the current procedure poses “a substantial risk of serious harm.”⁷⁵ *Baze*, thus, made it clear that “subjecting individuals to a risk of future harm—not simply actually inflicting pain—can qualify as cruel and unusual punishment.”⁷⁶ The plurality further stated that the plaintiff must establish that the state has refused to adopt a “feasible, readily implemented” alternative that “significantly” reduced the risk.⁷⁷ *Baze* therefore suggests that a plaintiff must not only allege that the state’s lethal injection procedure creates a substantial risk of serious pain, but must also proffer an alternative method significantly reducing that risk.

It should be noted that there remains serious disagreement about the *Baze* standard, a point that some Justices made even as the decision was issued.⁷⁸ As Professor Denno argues, *Baze* alludes to several risk standards and, consequently, provides scant guidance to lower courts.⁷⁹ It is therefore unsurprising to learn that lower courts have applied a variety of Eighth Amendment standards since *Baze*.⁸⁰ For example, courts disagree as to whether inmates must proffer an alternative method if they can demonstrate the dangers of the state’s existing method.⁸¹ Regardless, though the precise terms of the Eighth Amendment standard are debatable, there is broad agreement that the risk that an execution procedure will cause serious pain is an important part of the legal calculus.

But see Justin Marceau, *Lifting the Haze of Baze: Lethal Injection, the Eighth Amendment, and Plurality Opinions*, 41 ARIZ. ST. L.J. 159, 217 (2009) (discussing the “futility” of discerning the “narrowest ground” so long as discord among the Justices remains).

⁷⁵ See *Baze*, 553 U.S. at 52.

⁷⁶ *Id.* at 49.

⁷⁷ *Id.* at 52.

⁷⁸ See *id.* at 71 (Stevens, J., concurring) (noting that the plurality’s opinion, far from settling the issue, will generate further debate); *id.* at 94 (Thomas, J., concurring) (arguing that the plurality opinion “casts constitutional doubt on long-accepted methods of execution”).

⁷⁹ See Denno, *supra* note 17, at 1347–48.

⁸⁰ See *id.* at 1348 (quoting *Helling v. McKinney*, 509 U.S. 25, 33, 34–35, (1993)) (citing lower court cases stating that the procedure must be “sure or very likely to cause serious illness and needless suffering” and give rise to “sufficiently imminent dangers” in order to violate the Eighth Amendment).

⁸¹ See, e.g., *In re Lombardi*, 741 F.3d at 899–900 (Bye, J., dissenting) (discussing the disagreement). The Eighth Circuit’s recent decision to stay Russell Bucklew’s execution also indicates that in certain circumstances inmates may be excused from proffering an alternative method. See *Bucklew v. Lombardi*, No. 14-2163, 2014 WL 2724648, at *1 (8th Cir. May 20, 2014) (“[T]he requirement for an inmate to set forth an alternative method for execution does not apply in a case like this involving a specific, medically-based, as-applied, individual challenge to a method of execution.”).

2. Lethal Injection Since 2008

Less than two months after *Baze*, an Ohio state court held in *State v. Rivera* that “the use of two drugs in the lethal injection protocol (pancuronium bromide and potassium chloride) creates an unnecessary and arbitrary risk that the condemned will experience an agonizing and painful death.”⁸² For a remedy, the court ordered the State to adopt a one-drug protocol using only an anesthetic, a change that Ohio ultimately adopted by statute.⁸³ In *Baze*, the Supreme Court had rejected the plaintiff’s proffered alternative of a one-drug procedure, in large part because no state had ever tried it.⁸⁴ Ohio’s break from the three-drug procedure signaled a sea-change in lethal injection and also limited *Baze*’s precedential impact.⁸⁵ *Baze* had indicated that a lethal injection protocol “substantially similar” to Kentucky’s would pass constitutional muster,⁸⁶ raising difficult questions about how to determine whether other states’ three-drug protocols were, in fact, “substantially similar.”⁸⁷ This question became moot in several states after *Rivera* when twelve more states, following Ohio’s lead, adopted one-drug procedures relying on anesthetics like thiopental or pentobarbital.⁸⁸

These states’ shift to a one-drug protocol ostensibly alleviated Eighth Amendment concerns. After all, by adopting an anesthetic as the sole drug for execution procedures, these states eliminated the two drugs that had created the primary risk of pain in the first place. Almost immediately, however, states with both three and one-drug procedures had difficulty obtaining the drugs they had selected.⁸⁹ In 2010, Hospira, Inc., the sole U.S. manufacturer of thiopental, ceased domestic production of the drug at its domestic plant due to an “unspecified raw material supply problem.”⁹⁰ Hospira subsequently decided

⁸² *State v. Rivera*, No. 04CR065940, 2008 WL 2784679, at *6 (Ohio Ct. Com. Pl. June 10, 2008); Adam Liptak & Adam B. Ellick, *Judge Orders Ohio to Alter Its Method of Execution*, N.Y. TIMES, June 11, 2008, at A16, available at <http://www.nytimes.com/2008/06/11/us/11death.html?r=0&page-wanted=print>, archived at <http://perma.cc/3W5K-V9JW?type=pdf>.

⁸³ See Liptak & Ellick, *supra* note 82.

⁸⁴ See *Baze*, 553 U.S. at 41.

⁸⁵ See Denno, *supra* note 17, at 1354–56.

⁸⁶ See *Baze*, 553 U.S. at 61.

⁸⁷ See Berger, *supra* note 22, at 276.

⁸⁸ See *State by State Lethal Injection*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/state-lethal-injection>, archived at <http://perma.cc/R5QE-MLA8> (last visited Oct. 5, 2014). Missouri briefly intended to use propofol as its sole drug, but subsequently revised its procedure. See *id.*

⁸⁹ See generally James Gibson & Corinna Barrett Lain, *Death Penalty Drugs and the Moral Marketplace*, 103 GEO. L.J. (forthcoming 2015) (discussing the impact that international norms are having, through the marketplace, culture, and doctrine, in the death penalty context).

⁹⁰ Carol J. Williams, *Maker of Anesthetic Used in Executions is Discontinuing Drug*, L.A. TIMES, Jan. 22, 2011, <http://articles.latimes.com/2011/jan/22/local/la-me-execution-drug-20110122>, archived at <http://perma.cc/E8LS-6JTC>.

not to resume production of thiopental at its plant in Italy after Italian authorities threatened legal action if Hospira could not prevent the drug from being used in executions.⁹¹ In explaining its decision, Hospira noted both the threat of liability in Europe and the fact that it had never “condoned” use of thiopental in executions.⁹² Similarly, in 2011, the Danish company Lundbeck, Inc., the world’s sole producer of injectable pentobarbital, announced that it would not sell the drug to states for use in executions and would require its customers to pledge not to resell the drug to prisons.⁹³ Lundbeck subsequently sold the exclusive rights to pentobarbital to Akorn, Inc., an American company, with the express condition that it not sell pentobarbital for use in executions for a given period.⁹⁴

As a result of these and related developments, states have taken increasingly creative and legally dubious steps to procure drugs for their execution procedures. For example, Arizona, California, Tennessee, and possibly other states obtained thiopental from Dream Pharma, a “fly-by-night” middleman operating out of a west London driving school.⁹⁵ Similarly, Nebraska purchased thiopental for its three-drug procedure from a man in India who told the Swiss pharmaceutical company Naari AG that he would use their free samples to provide anesthetics in Zambia.⁹⁶ Upon learning of the thiopental’s actual destination, Naari was appalled and demanded that Nebraska return the drug.⁹⁷

⁹¹ See Press Release, Hospira, Inc., Hospira Statement Regarding Pentothal Market Exit (Jan. 21, 2011), http://phx.corporate-ir.net/phoenix.zhtml?c=175550&p=irolnews_Article&ID=1518610&highlight, archived at <http://perma.cc/Z5KV-Z4JF>; DEATH PENALTY INFORMATION CENTER, *Lethal Injection Overview*, <http://www.deathpenaltyinfo.org/lethal-injection-moratorium-executions-ends-after-supreme-court-decision>, archived at <http://perma.cc/C4EF-R5EJ> (last visited Oct. 6, 2014); Denno, *supra* note 17, at 1360–61.

⁹² See Press Release, Hospira, Inc., *supra* note 91.

⁹³ See Press Release, Lundbeck, *supra* note 9, at 1; Press Release, Lundbeck, *Lundbeck Overhauls Pentobarbital Distribution Program to Restrict Misuse* (July 1, 2011), http://files.shareholder.com/downloads/AMDA-GGC00/0x0x500520/5ab4436c-fefb-4d0a-923e-affa06db411c/LUN_News_2011_7_1_Press_Releases.pdf, archived at <http://perma.cc/5ELG-QL4D>.

⁹⁴ See Ed Pilkington, *U.S. Pharmaceutical Firm Hospira Under Fire over Use of Its Drugs in Executions*, GUARDIAN (Jan. 5, 2012) <http://www.theguardian.com/world/2012/jan/-/06/us-executions-death-penalty-drugs>, archived at <http://perma.cc/8MHU-QF9C>.

⁹⁵ See *Cook v. FDA*, 733 F.3d 1, 4 (D.C. Cir. 2013); Gibson & Lain, *supra* note 89, at 8; Owen Bowcott, *London Firm Supplied Drugs for U.S. Executions*, GUARDIAN, Jan. 6, 2011, <http://www.theguardian.com/world/2011/jan/06/london-firm-supplied-drugs-us-executions>, archived at <http://perma.cc/768-AHNL>.

⁹⁶ See Assoc. Press, *Swiss Company Demands Nebraska Return Drug Intended For Use In Lethal Injections*, BUSINESS INSIDER (Nov. 30, 2011), <http://www.businessinsider.com/nebraska-swiss-naari-ag-sodium-thiopental-2011-11#ixzz2uSzsNk2r>, archived at <http://perma.cc/PHQ2-FRRW>.

⁹⁷ See *id.*

The State, which had allegedly obtained the drugs under false pretenses, refused.⁹⁸

Hoping to cut off drugs from these and other foreign sources, several death row inmates sued the Food and Drug Administration (FDA), arguing that state correctional departments' importation of thiopental for executions violated the Food, Drug, and Cosmetic Act (FDCA) and the Administrative Procedure Act (APA).⁹⁹ The U.S. Court of Appeals for the District of Columbia Circuit ruled for the inmates, upholding a district court decision enjoining the FDA from allowing the importation of apparently misbranded or unapproved thiopental for executions.¹⁰⁰ The D.C. Circuit, thus, made clear that the FDCA requires the FDA to refuse admission to unapproved drugs, such as thiopental obtained from Dream Pharma.¹⁰¹ Though the court overturned the portion of the district court's ruling ordering the FDA to require non-party states to return their imported thiopental,¹⁰² its ruling nevertheless effectively blocked states from continuing to seek unscrupulous overseas dealers.

With their options ever-shrinking, states, including Missouri, Oklahoma, South Dakota, and others, have sought drugs like pentobarbital from compounding pharmacies, which, unlike "Big Pharma" manufacturing facilities, are subject to less rigorous, consistent regulation.¹⁰³ Compounding pharmacies typically mix small batches of drugs to order, but because they escape many FDA regulations, their products often have not been evaluated for effectiveness and safety.¹⁰⁴ Compounding pharmacies often also use active pharmaceutical ingredients (APIs) from complex, unsecured supply chains that can be diverted through "grey markets," making it difficult or impossible to verify whether the ingredients and their specific production lots conform to FDA requirements.¹⁰⁵

⁹⁸ See Maya Foa, *Why Is India Forced to Play Henchman to the Nebraska Executioner?*, GUARDIAN, Mar. 8, 2012, <http://www.theguardian.com/commentisfree/cifamerica/2012/mar/08/india-henchman-nebraska-executioner>, archived at <http://perma.cc/4JQ4-6FQA>.

⁹⁹ See *Cook*, 733 F.3d at 3.

¹⁰⁰ See *id.* at 11–12.

¹⁰¹ See *id.*

¹⁰² *Id.* at 3.

¹⁰³ See 21 U.S.C. § 353(a) (2006) (providing exceptions from other regulations for compounded drugs meeting certain requirements); Denno, *supra* note 17, at 1336; Gibson & Lain, *supra* note 89, at 18–28 (discussing the differences between "Big Pharma" drugs and compounded drugs).

¹⁰⁴ See Jesse M. Boodoo, *Compounding Problems and Compounding Confusion: Federal Regulation of Compounded Drug Products and the FDAMA Circuit Split*, 36 AM. J.L. & MED. 220, 230–34 (2010); Denno, *supra* note 17, at 1337 (citing a House of Representative study revealing that "almost all states provide overall ineffective oversight and regulation of the compounding pharmacies within their borders").

¹⁰⁵ See John L. Chollet & Michael J. Jozwiakowski, *Quality Investigation of Hydroxyprogesterone Caproate Active Pharmaceutical Ingredient and Injection*, 38 DRUG DEV. & IND. PHARM. 540, at 4 (2012), available at <http://www.pubfacts.com/detail/22329865/Quality-investigation-of-hydroxyprogesterone-caproate-active-pharmaceutical-ingredient-and-injection>, archived at <http://perma.cc/>

The chemicals, for example, may come from unregistered manufacturing plants in China and India, escaping all FDA oversight.¹⁰⁶ It is also not uncommon for compounding pharmacies' ingredients to be mislabeled, resulting in final products that are not what they purport to be.¹⁰⁷

Compounding pharmacies perform an important service by mixing small batches of drugs to order, but they are only licensed to dispense drugs, not to manufacture them.¹⁰⁸ Consequently, they often lack the basic infrastructure necessary to produce sterile, potent, safe injectable pentobarbital.¹⁰⁹ As one expert put it, the process for producing injectable pentobarbital is "technologically too difficult to do outside of FDA-regulated facilities."¹¹⁰ Moreover, FDA pharmacy inspections have found with alarming frequency that compounding

LJ2A-57QD (noting that many sources of APIs were "brokers who import and repackage drugs" and who had neither registered with nor been inspected by the FDA); Email from Sarah Sellers, PharmD, MPH, President, q-Vigilance, LLC, to Eric Berger (Sept. 19, 2014, 11:00 AM CST) [hereinafter Sellers Email]. Dr. Sellers, a pharmacoepidemiologist, former Research Fellow at the FDA's Office of Compliance, and Safety Reviewer in the FDA's Office of Safety and Epidemiology, studies safety concerns related to both FDA-approved and pharmacy compounded drugs. See *About Us*, WORKING GRP. ON PHARM. SAFETY, <http://www.4rxsafety.org/about-us-1/>, archived at <http://perma.cc/9FWR-3ZQM>, (last visited Oct. 4, 2014). Along with Tommy Thompson, the former U.S. Secretary of Health and Human Services and former Governor of Wisconsin, Dr. Sellers leads the Working Group on Pharmaceutical Safety, which advocates "for federal policy changes essential to reduce patient exposure to non-medically necessary compounded medications" so as to try to "prevent tragedies like [the] deadly meningitis outbreak caused by a compounding pharmacy mass-producing and distributing medicines outside of FDA oversight." *Background and Overview*, WORKING GRP. ON PHARM. SAFETY, <http://www.4rxsafety.org/about-us-1/>, archived at <http://perma.cc/VS74-UCY5> (last visited Oct. 6, 2014) [hereinafter Pharmaceutical Safety Overview].

¹⁰⁶ See Sellers Email, *supra* note 105; Sasich Declaration ¶¶ 16–17, *Taylor*, No. 14-CV-063-TCK-TLW [hereinafter Sasich Declaration].

¹⁰⁷ See Chollet & Jozwiakowski, *supra* note 105, at 8 (summarizing conclusions of study demonstrating the "variability in the quality" of a compounded injectable drug); Editorial Board, *Compounding Pharmacies Need FDA Oversight*, WASH. POST, Oct. 16, 2012, http://www.washingtonpost.com/opinions/compounding-pharmacies-need-fda-oversight/2012/10/16/12e5ee78-17af-11e2-9855-71f2b202721b_story.html, archived at <http://perma.cc/NZ54-TGFD>; Telephone Interview with Sarah Sellers, President, q-Vigilance, LLC (May 27, 2014) [hereinafter Sellers Interview].

¹⁰⁸ See Bette Hileman, *Drug Regulation*, C & EN (Apr. 12, 2004) at 24, archived at <http://perma.cc/LBG4-M4E4?type=pdf> (discussing lack of regulation and capacities of compounding pharmacies); Sellers Email, *supra* note 105.

¹⁰⁹ See Sasich Declaration, *supra* note 106, ¶ 12; Jennifer Gudeman et al., *Potential Risks of Pharmacy Compounding*, 13 DRUGS R&D 1, 3 (2012), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3627035/>, archived at <http://perma.cc/QZ2V-9PLD> (explaining that some compounding pharmacies have expanded their activities beyond their technological capabilities and that "poor practices on the part of drug compounders can result in contamination or in products that do not possess the strength, quality, and purity required" for a safe drug); Mark Thomas et al., *I.V. Admixture Contamination Rates: Traditional Practice Site Versus a Class 1000 Cleanroom*, 62 AM. J. HEALTH-SYST. PHARM. 2386 (2012), archived at <http://perma.cc/V8R3-BW5P?type=pdf> (finding contamination in compounded medication even when technicians compounded it in sterile environments, such as a cleanroom); Sellers Email, *supra* note 105.

¹¹⁰ Sasich Declaration, *supra* note 106, ¶ 12.

pharmacies purporting to produce sterile drug products did not follow procedures designed to prevent microbiological contamination of those products.¹¹¹ As if these conditions were not dangerous enough, one compounding pharmacy in Mississippi allegedly conceded that it did not have the facilities to produce the drug itself, so it instead supplied that State's Department of Corrections with the raw materials to mix.¹¹² Needless to say, if compounding pharmacies lack the facilities to mix safe drugs, state prisons hardly provide an acceptable alternative.

In short, many compounding pharmacies' practices heighten the risk that their drugs will be dangerously contaminated, impure, sub-potent, super-potent, or otherwise flawed.¹¹³ For example, contaminated steroids from a Massachusetts compounding pharmacy recently caused fungal meningitis in approximately 750 people, at least 64 of whom died.¹¹⁴ These horrific outcomes are hardly coincidental. As one consultant on the FDA's Science Board put it, "the potential harm associated with the use of such contaminated or sub-potent drugs is extremely high."¹¹⁵ As a result, one can only confirm the safety of compounded drugs by specifically testing each sample.¹¹⁶

¹¹¹ See *2013 Pharmacy Inspections and Related Records*, FDA, <http://www.fda.gov/AboutFDA/CentersOffices/OfficeofGlobalRegulatoryOperationsandPolicy/ORA/ORAElectronicReadingRoom/ucm340853.htm>, archived at <http://perma.cc/RFB8-B56R> (last visited Oct. 5, 2014) [hereinafter FDA Survey]; Dep't of Health & Hum. Servs., *Inspection for Abrams Royal Pharmacy*, FDA, (Dec. 20, 2013), <http://www.fda.gov/downloads/AboutFDA/CentersOffices/OfficeofGlobalRegulatoryOperationsandPolicy/ORA/ORAElectronicReadingRoom/UCM379743.pdf>, archived at <http://perma.cc/HB4P-QSDC>.

¹¹² See Gibson & Lain, *supra* note 89, at 47–48.

¹¹³ See Phil Johnson & Gregg Jones, *Pharmacist Compounding of Analgesic Medication: The Risk of a Little-Known Practice*, 84 J. FLA. M.A. 13, 14 (1997) (discussing how compounded products are "never tested as rigorously as a commercial product), archived at <http://perma.cc/S9L6-QEM6?type=pdf>; FDA Survey, *supra* note 111 (noting at least 240 instances of illness and death associated with compounded drugs between 1990 and 2005); Pharmaceutical Safety Overview, *supra* note 105; Sellers Interview, *supra* note 107; Denno, *supra* note 17, at 1370 ("As concern grew that some pharmacies were exceeding the scope of traditional compounding practices, the FDA issued reports in 2003 and 2006 revealing the discovery of compounded drugs that failed safety and efficacy tests, as well as serious illnesses and deaths that had occurred in association with compounded drugs.").

¹¹⁴ See Todd Wallack, *Victims of Tainted Drug Face Long Wait for Relief*, BOS. GLOBE, Oct. 2, 2013, <http://www.bostonglobe.com/metro/2013/10/01/new-england-compounding-victims-still-waiting-for-compensation-year-after-meningitis-outbreak/3zUCXAnXtTC21Yg4AQR3tl/story.html>, archived at <http://perma.cc/H7WZ-XM3G>.

¹¹⁵ Sasich Declaration, *supra* note 106, at ¶ 26; see also Hileman, *supra* note 108, at 25 (explaining that the FDA has associated compounded products with over 200 reported deaths or illnesses since 1990 and that this number is only the "tip of the iceberg" because compounding pharmacies are not required to report adverse events themselves).

¹¹⁶ See Sasich Declaration, *supra* note 106, at ¶ 18; Johnson & Jones, *supra* note 113, at 14 (explaining that to ensure an injectable drug is sterile, there must be a process that is reviewed, tested, validated, and documented).

In light of these dangers, it is unsurprising that states using compounded drugs in executions have experienced problems. When Oklahoma executed Michael Lee Wilson with compounded pentobarbital in January 2014, he cried out, “I feel my whole body burning!”¹¹⁷ This reaction is consistent with contaminated pentobarbital, which experts explain creates the excruciating sensation of sandpaper scraping the insides of a person’s veins.¹¹⁸ Similarly, when South Dakota executed Eric Robert with compounded pentobarbital in October 2013, he gasped and snorted heavily, turned a blue-purplish hue, and took 20 minutes to die.¹¹⁹ Subsequent analysis of the State’s pentobarbital supply indicated that it was, in fact, contaminated.¹²⁰ Similar episodes have occurred with compounded pentobarbital in other states as well.¹²¹

To their credit, some states and courts have recognized lethal injection’s dangers and halted executions until a safe execution can be assured.¹²² But other states, unhindered by courts, push on with executions, even though their lethal injection procedures pose serious dangers.¹²³ Several states have retained the problematic three-drug protocol, sometimes substituting pentobarbital or

¹¹⁷ See Jason Hancock, *Execution Secrecy Draws Criticism in Missouri*, KANSAS CITY STAR, Feb. 7, 2014, http://www.joliejustus.com/execution_secrecy_draws_criticism_in_missouri, archived at <http://perma.cc/WWU4-BH9C>.

¹¹⁸ See Sasich Declaration, *supra* note 106, at ¶¶ 61–63; Molly Redden, *New Lethal Injections Could Cause Extreme Pain, Make Deaths “Drag On” for Hours*, MOTHER JONES (Nov. 7, 2013), <http://www.motherjones.com/politics/2013/11/ohio-lethal-injection-cocktail-execution-drugs>, archived at <http://perma.cc/98UK-5NMX> (citing Dr. David Waisel, an associate professor of anesthesiology at Harvard Medical School, about pain caused by contaminated pentobarbital).

¹¹⁹ See Steve Young, *Execution: South Dakota Delivers Eric Robert His Death Wish*, ARGUSLEADER.COM (Oct. 16, 2012), <http://www.argusleader.com/article/20121016/NEWS/310160016/Execution-South-Dakota-delivers-Eric-Robert-his-death-wish>, archived at <http://perma.cc/5G76-RMSJ>.

¹²⁰ See *South Dakota Covers up Source of ‘DIY’ Death Penalty Drugs Ahead of Execution*, REPRIEVE (Oct. 30, 2012), http://www.reprive.org.uk/press/2012_10_30_South_Dakota_execution_drugs/, archived at <http://perma.cc/ENN9-VTFD>.

¹²¹ See, e.g., Elliot C. McLaughlin, *Appeals Court Stays Texas Execution After Intellectual Disability Claim*, CNN (May 12, 2014), <http://www.cnn.com/2014/05/13/justice/texas-execution-robert-james-campbell/>, archived at <http://perma.cc/58NV-ZKP5> (noting that Jose Luis Villegas complained of a burning sensation during his April execution in Texas using compounded pentobarbital).

¹²² See *Arthur v. Thomas*, No. 2:11-CV-0438-MEF, 2013 WL 5434694, at *1357 (M.D. Ala. Sept. 30, 2013) (permitting Eighth Amendment claims to proceed); *Hobbs v. Jones*, 412 S.W.3d 844, 854–55 (Ark. 2012) (invalidating execution protocol under state constitution); *Sims v. Dep’t of Corr. & Rehab.*, 157 Cal. Rptr. 3d 409, 428 (Cal. Ct. App. 2013) (holding that execution procedure violated state law); *Baze v. Thompson*, No. 06-CI-574, slip op. at 1 (Ky. Cir. Ct. Dec. 5, 2013) (continuing injunction against executions); *State v. Irick*, No. M1987-00131-SC-DPE-DD slip op. at 1, (Tenn. Dec. 11, 2013) (staying execution to permit evaluation of new execution protocol); Kimberly Leonard, *Lethal Injection Drug Access Could Put Executions on Hold*, CENTER FOR PUB. INTEGRITY (Apr. 4, 2012), <http://www.publicintegrity.org/2012/04/04/8589/lethal-injectiondrug-access-could-put-executions-hold>, archived at <http://perma.cc/DK2W-ECD6>.

¹²³ See DEATH PENALTY INFORMATION CENTER, *supra* note 88.

midazolam as the first drug with disastrous consequences.¹²⁴ For example, after the problematic execution of Michael Lee Wilson in January 2014, Oklahoma substituted midazolam as its first drug in a three-drug procedure for a pair of April 2014 executions.¹²⁵ This experiment yielded the State's second botched execution in four months. After the administration of the first drug, a doctor declared Clayton Lockett unconscious and permitted the administration of the second and third drugs. Shortly thereafter, Mr. Lockett twitched, gasped, and called out, "Man . . . something's wrong."¹²⁶ He then mumbled, shook his foot, and started convulsing violently, trying to rise up off the gurney and exhaling loudly.¹²⁷ Prison officials subsequently discovered a "vein failure" because "the line had blown," indicating that the midazolam, which was supposed to have rendered the inmate unconscious, had, in the words of Oklahoma's Director of the Department of Corrections, "either absorbed into tissue, leaked out or both."¹²⁸ Whatever the precise cause, the first drug clearly failed to take proper effect, and, as a result, Mr. Lockett was subjected to excruciating pain.¹²⁹ State officials finally attempted to halt the execution, but the inmate died anyway, forty-three minutes after the first injection.¹³⁰ Though Oklahoma Governor Mary Fallin issued an implausible statement that Lockett had remained unconscious during the process,¹³¹ the problems were so egregious that the State was forced to postpone the second execution scheduled for that same evening.¹³² The White House even took the unusual step of condemning the execution, stating that it fell short of the country's standard that "even when the death penalty is justified, it must be carried out humanely."¹³³

¹²⁴ See *id.* States still using the three-drug protocol sometimes also use a paralytic other than pancuronium bromide, such as vecuronium bromide.

¹²⁵ See Erick Eckholm, *One Execution Botched, Oklahoma Delays the Next*, N.Y. TIMES, Apr. 29, 2014, <http://www.nytimes.com/2014/04/30/us/oklahoma-executions.html>, archived at <http://perma.cc/6ZG2-3DVK>.

¹²⁶ See Erik Eckholm, *Inmate Dies After Execution Is Interrupted*, N.Y. TIMES, Apr. 30, 2014, at A12.

¹²⁷ See *id.*; Greg Botelho & Dana Ford, *Oklahoma Stops Execution After Botching Drug Delivery; Inmate Dies*, CNN (Apr. 30, 2014), <http://www.cnn.com/2014/04/29/us/oklahoma-botched-execution/> (reporting that a witness stated "[T]he convulsing got worse, and it looked like his whole upper body was trying to lift off the gurney.").

¹²⁸ See Eric Eckholm & John Schwartz, *Timeline Describes Frantic Scene at Oklahoma Execution*, N.Y. TIMES, May 1, 2014, <http://www.nytimes.com/2014/05/02/us/oklahoma-official-calls-for-outside-review-of-botched-execution.html?hp>, archived at <http://perma.cc/8H8K-NELD>.

¹²⁹ See Eckholm, *supra* note 126.

¹³⁰ See Botelho & Ford, *supra* note 127.

¹³¹ See *id.*

¹³² See Eckholm, *supra* note 126.

¹³³ See Erik Eckholm & Motoko Rich, *Oklahoma Faces Sharp Scrutiny over Botched Execution*, N.Y. TIMES, Apr. 30, 2014, <http://www.nytimes.com/2014/05/01/us/oklahoma-faces-sharp-scrutiny-over-botched-execution.html?hp>, archived at <http://perma.cc/8784-CCRB> (quoting White House Press Secretary Jay Carney).

Oklahoma is not the only state to experiment with midazolam and run into difficulties. Ohio, for example, used midazolam as its first drug in an unusual two-drug procedure for the execution of Dennis McGuire.¹³⁴ This execution was also problematic; the inmate gasped and convulsed for ten to thirteen minutes and took twenty-four minutes to die.¹³⁵ An anesthesiologist later reported that McGuire probably experienced “true pain and suffering.”¹³⁶ Arizona also used midazolam for Joseph Wood’s execution with similarly horrific results; Mr. Wood loudly gasped repeatedly (600 times, according to one account) and took nearly two hours to die.¹³⁷ Arizona Senator John McCain, a former prisoner of war, later referred to the execution as “torture.”¹³⁸

In light of this experience, it should be clear that lethal injection is hardly problem free and that at least some states use procedures that create substantial risks of serious pain in violation of the Eighth Amendment.¹³⁹ States, in fact, have yet to design a lethal injection protocol that always proceeds smoothly. Indeed, the traditional three-drug procedure, variations of the three-drug procedure using midazolam, two-drug procedures, and one-drug procedures relying on compounded drugs have each caused serious problems in recent years. As we shall see, courts frequently assume that these executions are safe and that Eighth Amendment challenges to execution methods are frivolous.¹⁴⁰ Given the history just recounted, this assumption is simply wrong.

¹³⁴ See DEATH PENALTY INFORMATION CENTER, *supra* note 88.

¹³⁵ See Dana Ford & Ashley Fantz, *Controversial Execution in Ohio Uses New Drug Combination*, CNN (Jan. 17, 2014), <http://www.cnn.com/2014/01/16/justice/ohio-dennis-mcguire-execution/> (“He gasped deeply. It was kind of a rattling, guttural sound. There was kind of a snorting through his nose. A couple of times, he definitely appeared to be choking.”).

¹³⁶ See Alan Johnson, *Dennis McGuire’s Execution Was Not ‘Humane,’ Doctor Says*, COLUMBUS DISPATCH, Aug. 12, 2014, <http://www.dispatch.com/content/stories/local/2014/08/12/inmate-suffered-pain-during-execution-doctor-says.html>, archived at <http://perma.cc/R533-G5XU> (reporting on the comments of Dr. Kent Diveley, an anesthesiologist at Scripps Mercy Hospital in San Diego, regarding “inhumane” executions).

¹³⁷ See Erik Eckholm, *Arizona Takes Nearly Two Hours to Execute Inmate*, N.Y. TIMES, July 23, 2014, <http://www.nytimes.com/2014/07/24/us/arizona-takes-nearly-2-hours-to-execute-inmate.html>, archived at <http://perma.cc/H4J9-NWC4>; Brian Haas, *Tennessee Fights Release of Execution Team Identities*, TENNESSEAN, Aug. 11, 2014, <http://www.tennessean.com/story/news/crime/2014/08/11/state-fights-release-execution-team-identities/13916255/>, archived at <http://perma.cc/8RK4-59G8>.

¹³⁸ See Burgess Everett, *John McCain: Arizona Execution “Torture,”* POLITICO (July 25, 2014) <http://www.politico.com/story/2014/07/john-mccain-arizona-execution-109350.html?hp=r2>, archived at <http://perma.cc/XK9Y-G8JQ>.

¹³⁹ See *In re Kemmler*, 136 U.S. 436, 447 (1890) (“Punishments are cruel when they involve torture or a lingering death.”).

¹⁴⁰ See *infra* notes 175–205 and accompanying text.

B. State Secrecy in Lethal Injection

Perhaps because they know their drugs and methods cannot be trusted, death penalty states often keep important details of their execution procedures secret.¹⁴¹ States have never been forthcoming about the details of their procedures,¹⁴² but, as states' procedures have become more haphazard and inconsistent in recent years, this problem has worsened.¹⁴³ Indeed, as states increasingly rely on unregulated compounding pharmacies for their drugs, the lack of transparency has grown even more pronounced.¹⁴⁴

Missouri's behavior in the days leading up to Michael Taylor's execution is emblematic of many states' bid for secrecy. Though compounded pentobarbital increases the risk of a painful execution, Missouri refused even to admit that its drugs were compounded or to permit them to be tested.¹⁴⁵ To assist the Department of Correction's efforts to maintain such secrecy, a Missouri statute not only shields execution team members' identities from disclosure, but goes so far as to create a civil cause of action against any person who discloses such information or discloses a record that might lead to the discovery of the identity of an execution team member,¹⁴⁶ thereby discouraging journalists from investigating the State's sketchy practices.

Missouri is hardly alone. Approximately half of states with lethal injection do not allow external evaluation of their execution protocols.¹⁴⁷ Colorado, for instance, tried to shield all details of its execution method from public scrutiny.¹⁴⁸ Other states, including Pennsylvania, have sought to keep secret their reliance on drugs from compounding pharmacies.¹⁴⁹ Georgia's "Lethal Injec-

¹⁴¹ See Denno, *supra* note 17, at 1376 (raising "the disturbing possibility that states are knowingly trying to hide the risks associated with compounded drugs").

¹⁴² See Ty Alper, *What Do Lawyers Know About Lethal Injection?*, 1 HARV. L. & POL'Y REV. 4 (2008), available at <http://www.hlpronline.com/Alper.pdf>, archived at <http://perma.cc/8HJ8-BT7E> (discussing states' evolving tactics to keep lethal injection procedures secret); Eric Berger, *In Search of a Theory of Deference: The Eighth Amendment, Democratic Pedigree, and Constitutional Decision Making*, 88 WASH. U. L. REV. 1, 10–12, 53–55 (2010); Berger, *supra* note 22, at 326.

¹⁴³ See Denno, *supra* note 17, at 1376–81.

¹⁴⁴ See *id.* at 1379 (summarizing comprehensive study indicating that "states typically withheld more information than in the past").

¹⁴⁵ See Tracy Connor, *Missouri: Execution Will Proceed Without Tulsa Pharmacy's Help*, NBC NEWS (Feb. 18, 2014), <http://www.nbcnews.com/news/us-news/missouri-execution-will-proceed-without-tulsa-pharmacies-help-n32946>, archived at <http://perma.cc/4K7E-8G4L>.

¹⁴⁶ See MO. REV. STAT. § 546.270(2)–(3) (2007).

¹⁴⁷ See Denno, *supra* note 17, at 1379–80.

¹⁴⁸ See *ACLU v. Colo. Dep't of Corr.*, No. 13CV32325 (Colo. Dist. Ct. Aug. 1, 2013), available at <http://aclu-co.org/case/aclu-v-colorado-department-of-corrections>, archived at <http://perma.cc/SKT2-R4F2>; Denno, *supra* note 17, at 1381.

¹⁴⁹ See Denno, *supra* note 17, at 1377.

tion Secrecy Act” shields drug suppliers not only from public disclosure,¹⁵⁰ but even from judicial scrutiny, classifying such information as a “confidential state secret.”¹⁵¹ Other states, including Arkansas, Louisiana, Missouri, Oklahoma, South Dakota, Tennessee, and Texas have taken similar routes, passing statutes that officially deem execution procedures secret, sometimes explicitly exempting such materials from state Freedom of Information Act (FOIA) inquiries.¹⁵²

State officials also work hard to conceal execution procedures. Officials in Oklahoma went so far as to defy and intimidate state judges who had taken the modest, hesitant step of contemplating hearing an inmate’s claims. After

¹⁵⁰ As Mary Fan argues, the confidentiality of lethal injection drug suppliers is analytically distinct from secrecy concealing the method of execution. See Mary D. Fan, *Extending Executioner Confidentiality to Lethal Injection Drug Suppliers*, 95 B.U. L. REV. (forthcoming 2015) (manuscript at 17–19), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2492799, archived at <http://perma.cc/AB6T-VPDU>. However, because many compounding pharmacies lack the ingredients, equipment, and processes to make injectable pentobarbital and some other drugs safely, the practices of the drug supplier can be very relevant to the question of whether the lethal injection procedure creates a substantial risk of significant pain. See *supra* notes 102–121 and accompanying text. That said, as argued below, were courts to require neutral chemical testing of the drugs, they could help protect against unconstitutional executions while simultaneously following state laws preserving drug supplier confidentiality. See *infra* notes 373–384 and accompanying text.

¹⁵¹ See GA. CODE ANN. § 42-5-36(d)(2) (West 2013) (“[T]he identifying information of any person or entity that manufactures, supplies, compounds, or prescribes the drugs, medical supplies, or medical equipment utilized in the execution of a death sentence shall be . . . classified as a confidential state secret.”); Denno, *supra* note 17, at 1377; Rhonda Cook & Bill Rankin, *Lethal Injection Secrecy Bill Wins Approval*, ATLANTA J. CONST. (Mar. 26, 2013), <http://www.ajc.com/news/news/state-regional-govt-politics/lethal-injection-secrecy-bill-wins-approval/nW4tK/>, archived at <http://perma.cc/MV2W-WXCS>.

¹⁵² See, e.g., ARK. CODE § 5-4-617 (2013) (exempting matters pertaining to execution procedures from state FOIA); LA. REV. STAT. ANN. § 15:570 (2012) (amended 2014); OKLA. STAT. § 22-17-1015(B) (2011) (“The identity of all persons who participate in or administer the execution process and persons who supply the drugs, medical supplies or medical equipment for the execution shall be confidential and shall not be subject to discovery in any civil or criminal proceedings”); TENN. CODE ANN. § 40-20-206 (West 2014) (“Notwithstanding any other law to the contrary, those parts of the record identifying an individual or entity as a person or entity who or that has been or may in the future be directly involved in the process of executing a sentence of death shall be treated as confidential and shall not be open to public inspection.”); S.D. CODIFIED LAWS § 23A-27A-31.2 (2013) (“The name, address, qualifications, and other identifying information relating to the identity of any person or entity supplying or administering the intravenous injection substance or substances . . . are confidential. Disclosure of the foregoing information may not be authorized or ordered.”); Lauren Sudeall Lucas, *Death in the Sunset of a Constitutional Showdown*, JURIST (June 1, 2014), <http://jurist.org/forum/2014/06/lauren-lucas-death-showdown.php>, archived at <http://perma.cc/G2RC-SXC5> (listing states with lethal injection secrecy laws). In states that do not exempt their execution procedures from FOIA requests, inmates may have success requesting information under a state FOIA claim. Some states, however, not only exempt their execution procedures from FOIA but from administrative procedure more generally. See, e.g., *Abdur’Rahman v. Bredeesen*, 181 S.W.3d 292, 311–12 (Tenn. 2005) (noting that lethal injection protocol was not a “rule” subject to Uniform Administrative Procedure Act).

the Oklahoma Supreme Court issued a stay of execution so that the judiciary could determine whether death-row inmates were being denied “their constitutional right to access to the courts,”¹⁵³ Oklahoma Governor Mary Fallin announced that the executive branch would not honor the stay.¹⁵⁴ Not wishing to be outdone, a state legislator commenced impeachment proceedings against the five Justices who had voted in favor of the stay.¹⁵⁵ The Oklahoma Supreme Court, perhaps buckling under this political pressure, subsequently held that state laws insulating lethal injection procedures from discovery were, in fact, valid and constitutional.¹⁵⁶ Less than a week later, the State badly botched Clayton Lockett’s execution, using the very procedure about which Lockett had sought information.¹⁵⁷

State secrecy sometimes extends to events that transpire during executions. When things go wrong, states often draw the blinds of the execution chamber so that witnesses cannot see what is happening. For example, when it became clear that Lockett’s execution was going horribly awry, correctional officials closed the blinds, blocking the witnesses’ and media’s view until Lockett finally died 24 minutes later.¹⁵⁸ States also sometimes cover the catheter with a sheet, making it impossible to see problems as they develop. During Lockett’s execution, for instance, the State covered the IV access site with a sheet, thus concealing an area of swelling “larger than a golf ball.”¹⁵⁹ The swelling, of course, signaled that he drugs were infiltrating, entering not the vein but the surrounding tissues. Oklahoma’s practice of secrecy continued even *after* the botched Lockett execution, as state officials resisted requests for execution logs and related records.¹⁶⁰

¹⁵³ Lockett & Warner v. Evans, No. 112,741, slip op. at 7 (Ok. Apr. 21, 2014).

¹⁵⁴ See Andrew Cohen, *Oklahoma Just Neutered Its State Supreme Court*, THE WEEK, Apr. 29, 2014, <http://theweek.com/article/index/260632/oklahoma-just-neutered-its-state-supreme-court>, archived at <http://perma.cc/9XYU-TAMD>.

¹⁵⁵ See *id.*

¹⁵⁶ See Lockett & Warner, No. 122,741, slip op. at 6.

¹⁵⁷ See *supra* notes 124–131 and accompanying text.

¹⁵⁸ See Eckholm & Rich, *supra* note 133.

¹⁵⁹ See OKLA. DEP’T OF PUB. SAFETY, THE EXECUTION OF CLAYTON D. LOCKETT: EXECUTIVE SUMMARY 18 (2014), available at <http://www.dps.state.ok.us/Investigation/14-0189SI%20Summary.pdf>, archived at <http://perma.cc/M4H3-MNJJ> [hereinafter LOCKETT EXECUTION REPORT]. The warden later explained because the IV access point was in Lockett’s groin, the sheet was intended to “maintain Lockett’s dignity and keep his genital area covered.” See *id.* at 17. Oklahoma’s normal practice, however, is to cover the IV access point with a sheet, regardless of the location on the inmate’s body. *Id.*

¹⁶⁰ See Cary Aspinwall & Ziva Branstetter, *DOC Has Yet to Release Logs from Botched April Execution; State Waiting on Autopsy*, TULSA WORLD (Aug. 16, 2014) http://www.tulsaworld.com/news/government/doc-has-yet-to-release-logs-from-botched-april-execution/article_63a868d8-1912-51bd-ae34-dca1aca40cfb.html, archived at <http://perma.cc/A4AM-HHRP>.

State secrecy in lethal injection has become so pervasive that some states withhold their reasons for secrecy. For example, when Texas Attorney General Greg Abbott announced that the Texas Department of Criminal Justice “must withhold” information about the pharmacists supplying drugs to the State, he cited a “threat assessment” from the Texas Department of Public Safety.¹⁶¹ He refused to release the assessment, however, deeming it “law enforcement sensitive information.”¹⁶²

In fairness, it is important to note that some state justice departments have started to require more transparency, and most states usually do provide *some* information about their execution procedures.¹⁶³ Inmates, for instance, know that the state plans to execute them with lethal injection, and, in most states, they also know the kind of drugs. State secrecy also varies widely between states. Several states publish some details of their execution protocol,¹⁶⁴ and a few offer detailed protocols.¹⁶⁵ Significantly, though, many states conceal information most vital to determining the safety of their procedure, including, *inter alia*, the qualifications of the person inserting the catheter into the inmates’ veins, the qualifications of the person mixing the drugs, the qualifications of the person monitoring the inmate’s anesthetic depth, the chemical properties of the actual drugs used, and the amounts of the drugs to be injected.¹⁶⁶

For example, Oklahoma’s execution protocol is conspicuously silent on several issues bearing directly on the risk of pain.¹⁶⁷ Oklahoma devotes over half of its twenty-page protocol to issues largely unrelated to the safety of the procedure, providing detailed steps for notifying an offender of a scheduled execution, holding cell procedures, the selection of media witnesses, last meal requests, and persons allowed at an execution.¹⁶⁸ The protocol, however, is less

¹⁶¹ See Editorial, *Greg Abbot Switches Position on Death Row Drug Sources*, STAR TELEGRAM, June 1, 2014, <http://www.star-telegram.com/2014/06/01/5863837/editorial-greg-abbott-switches.html?rh=1>, archived at <http://perma.cc/MD5A-JXX5>.

¹⁶² See *id.*

¹⁶³ See, e.g., Freedom of Information Act Appeal Concerning Department of Correction, Del. Op. Att’y Gen. 11-IIB14 (2011), 2011 WL 4062225 (concluding that “the DOC has erred under FOIA”); Denno, *supra* note 17, at 1380.

¹⁶⁴ See generally, e.g., ARIZ. DEP’T OF CORR., DEPARTMENT ORDER MANUAL: EXECUTION PROCEDURES (2012), archived at <http://perma.cc/L44G-HYUJ?type=pdf> (detailing Arizona execution procedures); ANITA TRAMMELL, PROCEDURES FOR THE EXECUTION OF OFFENDERS SENTENCED TO DEATH (2014), archived at <http://perma.cc/JD9E-FEYV?type=pdf> [hereinafter OKLAHOMA PROTOCOL] (detailing Oklahoma execution procedures).

¹⁶⁵ See, e.g., MONT. DEP’T OF CORR., EXECUTION TECHNICAL MANUAL (2013), archived at <http://perma.cc/523L-9SL4>. California no longer has an active protocol, but its last version was also detailed. See CAL. GOV’T CODE § 11349.3 (West 2012).

¹⁶⁶ See Denno, *supra* note 17, at 1376–82.

¹⁶⁷ See OKLAHOMA PROTOCOL, *supra* note 164.

¹⁶⁸ See *id.* at 1–13.

precise on several important issues. For example, it is vague about the qualifications and training of several key members of the execution team, including the person inserting the IV-line into the inmate,¹⁶⁹ the person monitoring the inmate's consciousness after the delivery of the anesthetic,¹⁷⁰ and the three people administering the drugs.¹⁷¹ It also lists five different possible drug combinations, thereby vesting the Warden with "sole discretion" to select the combination to be used for each execution,¹⁷² thus creating even more uncertainty and unpredictability.

To be sure, as discussed below, the states believe that secrecy furthers important interests. Most of these state interests, however, can be protected with far narrower measures.¹⁷³ To this extent, the tremendous breadth of state secrecy suggests that states may guard the details of their execution procedures to conceal their own inconsistencies and incompetence.¹⁷⁴

C. Judicial Sanction of State Secrecy

The majority of courts, especially federal appellate courts, have permitted states to keep secret important details from their lethal injection procedures.¹⁷⁵ The U.S. Court of Appeals for the Eighth Circuit, for example, has repeatedly rejected inmates' requests for information about the method by which they will be executed.¹⁷⁶ In *Williams v. Hobbs*, the Eighth Circuit rejected an Arkansas inmate's asserted right to know the State's lethal injection procedure, stating that inmates do not have a due process right to such information.¹⁷⁷ In *In re Lombardi*, the Eighth Circuit considered the State of Missouri's petition for a writ of mandamus that would prohibit, *inter alia*, laboratory tests verifying the State's drugs for potency, purity, and sterility.¹⁷⁸ Though the court recognized that mandamus is an "[e]xtraordinary" writ,¹⁷⁹ it nevertheless granted the petition. In rejecting the plaintiff's request for various details about the State's execution procedure, the Eighth Circuit bafflingly deemed the requested material

¹⁶⁹ See *id.* at 14 (specifying that an "EMT-P or person with similar qualifications and experience" will insert the IV into the inmate, without defining "similar qualifications and experience" and without specifying how much experience that person must have had inserting IV lines).

¹⁷⁰ See *id.* at 16 (stating that a "physician" will monitor the inmate's consciousness without specifying whether that doctor should have training in monitoring anesthetic depth).

¹⁷¹ See *id.* at 14 (stating that the warden will choose three persons to administer the drugs without any specification as to those persons' qualifications or training).

¹⁷² See *id.* at 15–18.

¹⁷³ See *infra* notes 356–419 and accompanying text.

¹⁷⁴ See Denno, *supra* note 17, at 1379–81.

¹⁷⁵ See *infra* notes 176–205 and accompanying text.

¹⁷⁶ See, e.g., *Williams v. Hobbs*, 658 F.3d 842, 852 (8th Cir. 2011).

¹⁷⁷ See *id.*

¹⁷⁸ See 741 F.3d at 889, 893.

¹⁷⁹ *Id.* at 893.

to be “plainly not relevant,”¹⁸⁰ even though the safety of the execution procedure hinges upon such details.¹⁸¹ In *Taylor*, the Eighth Circuit affirmed the trial court’s denial of information about the pentobarbital Missouri planned to use. Though the State had found new compounded pentobarbital less than a week before the execution and though significant evidence indicated that compounded pentobarbital had caused pain in previous executions,¹⁸² the Eighth Circuit did not even offer reasoning, summarily affirming without comment.¹⁸³

Though the precise factual and procedural contexts differ, other federal appellate courts, including the Fifth, Ninth, and Eleventh Circuits, have also rejected this right to information.¹⁸⁴ In *Sepulvado v. Jindal*,¹⁸⁵ for instance, the U.S. Court of Appeals for the Fifth Circuit overturned a trial court decision finding a due process right to information about an upcoming execution procedure.¹⁸⁶ In rejecting the argument that “an inmate who is to be executed cannot challenge a protocol as violative of the Eighth Amendment until he knows what that protocol contains,” the *Sepulvado* court simply responded that such an approach would “frustrate ‘the State’s significant interest in enforcing its criminal judgments.’”¹⁸⁷ Other circuits have similarly rejected inmates’ challenges to last-minute drug substitutions.¹⁸⁸

These circuits’ apparent impatience for these claims is, to some extent, understandable, given that the U.S. Supreme Court has signaled its own hostility to such arguments. In addition to denying inmates’ petitions for certiorari requesting access to execution procedure details,¹⁸⁹ the Court has also taken the more dramatic step of reversing an order granting a temporary stay of execution so that the court could “fully consider [an inmate’s] challenge to Arizona’s use of sodium thiopental obtained from an unidentified, non-FDA ap-

¹⁸⁰ See *id.* at 897.

¹⁸¹ See *supra* notes 48–174 and accompanying text.

¹⁸² See *Zink*, No. 12-04209-CV-C-BP, slip op. at 2–3; Carey Gillam, *Looming Missouri Execution Turns Spotlight on Lethal Injection Drugs*, REUTERS (Feb. 24, 2014), <http://www.reuters.com/article/2014/02/24/us-usa-missouri-execution-idUSBREA1N0UM20140224>, archived at <http://perma.cc/TX9K-JU2Z>.

¹⁸³ See *Bowersox*, No. 14-1403, slip op. at 1 (affirming district court denial of motion for stay of execution).

¹⁸⁴ See, e.g., *Wellons v. Comm’r, Ga. Dep’t of Corr.*, 754 F.3d 1260, 1267 (11th Cir. 2014); *Beaty*, 649 F.3d at 1072–73; *Sepulvado*, 729 F.3d at 419; *Valle*, 655 F.3d at 1236 & n.13; *Powell*, 641 F.3d at 1258.

¹⁸⁵ 729 F.3d at 413.

¹⁸⁶ See *id.* at 419.

¹⁸⁷ See *id.* (quoting *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)).

¹⁸⁸ See, e.g., *Jackson v. Danberg*, 656 F.3d 157, 161–63 (3d Cir. 2011); *Pavatt v. Jones*, 627 F.3d 1336, 1337–38 (10th Cir. 2010).

¹⁸⁹ See, e.g., *Taylor*, 132 S. Ct. at 1375; *Sepulvado*, 134 S. Ct. at 1789; *Zink v. Lombardi*, 132 S. Ct. 1790, 1790 (2014).

proved source.”¹⁹⁰ The U.S. District Court for the District of Arizona, in *Landrigan v. Brewer* had emphasized that Arizona had denied the inmate “any information regarding the drug,”¹⁹¹ except to inform him less than a week before his execution that it planned to use a non-FDA approved drug.¹⁹² The Supreme Court, nevertheless, vacated the stay, explaining only that “[t]here is no evidence in the record to suggest that the drug obtained from a foreign source is unsafe.”¹⁹³ Of course, the State’s own refusal to share any information deprived the trial court of any meaningful record one way or another, which was why that court had granted the stay to permit further investigation.¹⁹⁴ The Supreme Court, however, instead gave Arizona the benefit of the doubt and refused to give Landrigan an opportunity to learn about the drugs the State would use to execute him.

In fairness, some courts have recognized the importance of allowing the condemned access to a state’s execution plans.¹⁹⁵ In *Oken v. Sizer*, for example, the U.S. District Court for the District of Maryland emphasized that the State had changed the execution procedure just days before a scheduled execution.¹⁹⁶ Although Maryland contended that the inmate’s request for the procedure was untimely and that the court should trust the State to use a safe protocol not materially different from previous protocols, the district court ruled that, given the matter’s grave importance, the State “ask[ed] too much of Oken and of the Court.”¹⁹⁷ Indeed, “[f]undamental fairness, if not due process, requires that the execution protocol that will regulate an inmate’s death be forwarded to him in prompt and timely fashion.”¹⁹⁸ The court concluded by emphasizing that “[d]ue process requires nothing less—an opportunity to receive notice of how one’s rights will be affected and opportunity to respond and be heard.”¹⁹⁹ More recently, the U.S. District Court for the Southern District of

¹⁹⁰ *Landrigan v. Brewer*, No. 10–02246, 2010 WL 4269559, at *12 (D. Ariz. Oct. 25, 2010), *aff’d*, 625 F.3d 1144 (9th Cir. 2010), *rev’d*, 131 S. Ct. 445 (Oct. 26, 2010) (vacating temporary restraining order).

¹⁹¹ *Id.* at *8.

¹⁹² *See id.*

¹⁹³ *Landrigan*, 131 S. Ct. at 445.

¹⁹⁴ *See Landrigan*, 2010 WL 4269559, at *12.

¹⁹⁵ *See, e.g., Sells & Llanas v. Livingston*, No. H-14-832 (S.D. Tex. Apr. 2, 2014) (entering preliminary injunction requiring state to disclose under seal all information regarding procurement of drugs); *Hill v. Owens*, 2013-cv-233771 (Ga. Super. Ct. July 18, 2013) (granting stay of execution and finding substantial likelihood that statute prohibiting disclosure of all execution information is unconstitutional), *rev’d*, 758 S.E.2d 794 (Ga. 2014); *ACLU v. Colo. Dep’t of Corr.*, No. 13-CV-32325, slip op. at 6 (Denver Dist. Ct. Aug. 1, 2013), *available at* <http://aclu-co.org/case/aclu-v-colorado-department-of-corrections>, *archived at* <http://perma.cc/P4DV-EWZX>.

¹⁹⁶ 321 F. Supp. 2d 658, 660 (D. Md. 2004).

¹⁹⁷ *Id.* at 664.

¹⁹⁸ *See id.*

¹⁹⁹ *Id.* at 665 (citing *Mullane v. Central Hanover Bank*, 339 U.S. 306, 314 (1950)).

Ohio issued and then extended a moratorium on that State's executions, attributing the delay to "the continuing need for discovery and necessary preparations related to the adoption and implementation of the new execution protocol."²⁰⁰ Other courts, without explicitly reaching the due process question, have examined state lethal injection procedures closely, thereby signaling that a court cannot fairly rule on an inmate's method-of-execution challenge if it lacks important information about the procedure in question.²⁰¹

Some dissenting judges have also echoed *Oken*'s recognition that inmates need adequate information about execution procedures "in order that they may determine whether or not their Eighth Amendment rights are being violated."²⁰² As Judge Bye noted in dissent, "Taylor is in an obviously disadvantaged position because Missouri has, perhaps drastically, changed how Taylor will be executed by substituting any number of new components and actors within the last week."²⁰³ Without closer examination, Judge Bye added, there is no way to know whether the compounding pharmacy is any more competent than "a high school chemistry class."²⁰⁴ The Ninth Circuit's Judge Reinhardt in dissent similarly noted that a last minute change in protocol drugs raised a question of procedural due process, namely "whether an individual may be executed pursuant to a protocol substituted for the established means of execution, eighteen hours before the scheduled time of execution and without sufficient opportunity even to present his constitutional objections."²⁰⁵ This line of reasoning, however, represents the minority view. The majority view has repeatedly denied inmates this right to information, even when states make last minute changes to their execution procedures.

II. EIGHTH AMENDMENT DUE PROCESS

This Part argues that courts should grant inmate plaintiffs access to information bearing on whether a state's lethal injection procedure creates a risk of substantial pain. Section A argues that inmates have a right to this information through discovery under the Federal Rules of Civil Procedure. Section

²⁰⁰ *In re Ohio Execution Protocol Litigation*, No. 11-cv-1016 (S.D. Ohio Aug. 8, 2014) (order extending stay of Ohio executions until January 15, 2015); *In re Ohio Execution Protocol Litigation*, No. 11-cv-1016 (S.D. Ohio May 27, 2014) (order staying Ohio executions until August 15, 2014).

²⁰¹ See *Harbison v. Little*, 511 F. Supp. 2d 872, 880 (M.D. Tenn. 2007); *Taylor*, 2006 WL 1779035, at *2-6; *Morales v. Hickman*, 415 F. Supp. 2d 1037, 1043-46 (N.D. Cal. 2006).

²⁰² See, e.g., *Bowersox*, No. 14-1403, slip op. at 2 (Bye, J., dissenting); see also Della Hasselle, *State Must Reveal Details of Death-Penalty Practices, Federal Magistrate Rules*, LENS (June 5, 2013), <http://thelensnola.org/2013/06/05/state-must-reveal-details-of-death-penalty-practices-federal-judge-rules/#>, archived at <http://perma.cc/YR2Q-PV5Y>.

²⁰³ See *Bowersox*, No. 14-1403, slip op. at 2.

²⁰⁴ See *id.*

²⁰⁵ *Beatty*, 649 F.3d at 1072 (Reinhardt, J., dissenting).

B contends that inmates possess a due process right to this information. Section C explains that the states' interests do not justify withholding the information. Section D summarizes the due process remedy. Finally, Section E considers and rejects potential counter-arguments.

A. The Right to Discovery Under the Federal Rules

As an initial matter, it is not clear that a death row inmate should even need to resort to a due process argument to obtain information about the state's execution procedure. Rule 26(b)(1) of the Federal Rules of Civil Procedure provides for broad discovery,²⁰⁶ permitting civil litigants to obtain from their adversaries "any nonprivileged matter that is relevant to any party's claim or defense Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."²⁰⁷ Broad discovery, indeed, is essential to a well-functioning adversarial litigation system. As the U.S. Supreme Court explained in *Hickman v. Taylor*, "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession."²⁰⁸

There is no question that information about a challenged lethal injection procedure is relevant to an inmate's Eighth Amendment claim.²⁰⁹ As the trial court found when it granted discovery over Pennsylvania's objection in *Chester v. Beard*, "understanding and evaluating the drugs used in a lethal injection protocol is an integral part of this constitutional analysis."²¹⁰ Indeed, as that court held, such information "lies at the heart of the Eighth Amendment analysis."²¹¹ Moreover, as discussed below, the burden imposed on the states by discovery is very modest.²¹² In light of this minimal burden and the importance of the discovery to the plaintiff's case, any judicial balancing should clearly weigh in favor of discovery.²¹³

²⁰⁶ See FED. R. CIV. P. 26(b)(1); 8 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE CIVIL* § 2008 (3d ed. 2010) (noting that admissibility at trial is not the limit of discovery and that discovery of inadmissible matter may be had).

²⁰⁷ FED. R. CIV. P. 26(b)(1).

²⁰⁸ 329 U.S. 495, 507 (1947).

²⁰⁹ See *supra* notes 48–140; *infra* notes 457–485 and accompanying text.

²¹⁰ No. 1:08-CV-1261, 2012 WL 5386129, at *5 (M.D. Pa. Nov. 1, 2012).

²¹¹ *Id.*

²¹² See *infra* notes 356–419 and accompanying text.

²¹³ See FED. R. CIV. P. 26(b)(2)(C)(iii) ("[T]he court must limit the frequency or extent of discovery otherwise allowed by these rules . . . if it determines that . . . the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."); *Chester*, 2012 WL 5386129, at *5.

States might nevertheless point out that Rule 26's broad ambit only applies to "nonprivileged matter."²¹⁴ They therefore might object that their own laws privilege information pertaining to execution procedures, thereby shielding that information from ordinary discovery.²¹⁵ This argument, however, is unavailing, because Rule 501 of the Federal Rules of Evidence makes clear that federal common law, not state law, governs claims of privilege in federal question cases.²¹⁶ For example, the federal common law of privilege overrides state press shield laws in federal question cases.²¹⁷

The question, nonetheless, remains whether federal courts applying the federal common law of privilege should find that the federal common law merely tracks the relevant state statute.²¹⁸ They should not. First, in some states, the statutes concealing lethal injection procedures are not technically "privileges" but rather provisions treating the information as "confidential" or exempt from disclosure under state FOIA provisions.²¹⁹ It is therefore not clear that these materials should be treated as "privileged" under Rule 501.²²⁰

More importantly, even where state legislation does create a "privilege" for some or all of the relevant material,²²¹ that fact is hardly decisive in deter-

²¹⁴ FED. R. CIV. P. 26(b)(1).

²¹⁵ The precise meaning of the term "privilege" is a knotty one. See 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, *FEDERAL PRACTICE AND PROCEDURE EVIDENCE* § 5423 (1st ed. 1980) ("Congress gave little indication of the meaning it attributed to the word 'privilege.'").

²¹⁶ See FED. R. EVID. 501. Rule 501 also stipulates that "in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision." *Id.* This provision does not apply to Eighth Amendment lethal injection challenges because the claim plainly arises under federal law and no state law can override the U.S. Constitution. See U.S. CONST. art. VI, § 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof. . . shall be the supreme Law of the Land.").

²¹⁷ See *Zinna v. Brd. of Cnty. Comm'rs*, 250 F.R.D. 527, 529 (D. Colo. 2007); Theodore Campanolo, *The Conflict Between State Press Shield Laws and Federal Criminal Proceedings: The Rule 501 Blues*, 38 GONZ. L. REV. 445, 448 (2003) (explaining that state press shield laws "provide no protection to a journalist" in federal cases because Rule 501 specifies that the federal common law of privilege applies).

²¹⁸ See WRIGHT & GRAHAM, *supra* note 215, § 5324 n.34 (suggesting that the federal common law may sometimes follow state law when the state privilege concerns secrets of state government).

²¹⁹ See, e.g., ARK. CODE § 5-4-617(g) (2013) ("The procedures [regarding lethal injection and its implementation] . . . are not subject to disclosure under the Freedom of Information Act of 1967."); S.D. CODIFIED LAWS § 23A-27A-31.2 (2013) (classifying as "confidential" the "name, address, qualifications, and other identifying information relating to the identity of any person or entity supplying or administering the intravenous injection substance or substances" and treating disclosure of such information as a misdemeanor); TENN. CODE § 10-7-504(h)(1) (2014) (treating records identifying individuals or entities "directly involved in the process executing a sentence of death" as "confidential" and stating that they "shall not be open to public inspection").

²²⁰ Admittedly, the fact that a state has or has not labeled something a "privilege" is relevant but not decisive to the inquiry. See WRIGHT & GRAHAM, *supra* note 215, § 5423.

²²¹ See, e.g., GA. CODE § 42-5-36(b)-(c) (classifying materials as "confidential state secrets and privileged under law"); OKLA. STAT. § 22-17-1015(B) (2011) ("The identity of all persons who participate in or administer the execution process and persons who supply the drugs, medical supplies or

mining the content of federal common law, especially given the weighty federal constitutional concerns favoring broad discovery.²²² While federal courts do sometimes consider state privilege law a factor in determining whether an asserted privilege applies under federal common law,²²³ they also recognize the need to safeguard federal interests from interference by state privileges.²²⁴ Those federal interests are particularly strong in civil rights cases where inmates assert violations of their federal constitutional rights; where the information sought is crucial to the plaintiff's case; where the state entirely controls the information in question; and where the inmate also has a strong due process argument in favor of discovery.²²⁵ Indeed, the broad discovery favored in federal litigation is especially important in civil rights actions, which "should be resolved by a determination of the truth rather than a determination that the truth shall remain hidden."²²⁶ For these reasons, the court in *Chester* rejected Pennsylvania's assertion of a privilege, emphasizing that the state's information about its lethal drugs "is not available through other discovery from other sources, and the information is important to the adjudication of the issues raised in this case."²²⁷

Moreover, even if the state's asserted privilege were relevant to the content of the federal common law of privilege, inmates' due process rights should trump that privilege.²²⁸ It would be passing strange for federal common law to

medical equipment for the execution shall be confidential and shall not be subject to discovery in any civil or criminal proceedings.").

²²² See, e.g., *United States v. Criden*, 633 F.2d 346, 357–58 (3d Cir. 1980) (noting that evidentiary privileges are generally not favored because they interfere with the search for truth).

²²³ See, e.g., *Awalt v. Marketti*, 287 F.R.D. 409, 416 (N.D. Ill. 2012); *Clemmer v. Office of Chief Judge*, 544 F. Supp. 2d 722, 725 (N.D. Ill. 2008).

²²⁴ See *Gargiulo v. Baystate Health Inc.*, 279 F.R.D. 62, 64 (D. Mass. 2012) (holding that federal interests favored robust discovery and therefore disfavored the state privilege).

²²⁵ See *Zinna*, 250 F.R.D. at 529 (holding in § 1983 action that federal law of privilege applied and that state's "press shield privilege" therefore did not offer protection); *Crawford v. Dominic*, 469 F. Supp. 260, 263 (E.D. Pa. 1979) (noting that "the importance of the information to the plaintiff's case" is the "weightiest factor" in determining whether to grant discovery in civil rights case); Edward F. Sherman & Stephen O. Kinnard, *Federal Court Discovery in the '80s—Making the Rules Work*, 95 F.R.D. 245, 279 (1982) (noting that some kinds of civil rights cases "may be seen as involving constitutional values of high import and as presenting a particular need for broad discovery" that personal injury or commercial cases might not).

²²⁶ *Inmates of Unit 14 v. Rebideau*, 102 F.R.D. 122, 128 (N.D. NY 1984); see also *Steinberg v. Mt. Sinai Med. Ctr., Inc.*, No. 12 CIV. 51 SLT VMS, 2014 WL 1311572, at *6 (E.D.N.Y. Mar. 31, 2014); *Milburn v. City of York*, No. 1:12-CV-0121, 2013 WL 3049108, at *4 (M.D. Pa. June 17, 2013); *Kinoy v. Mitchell*, 67 F.R.D. 1, 12 (S.D.N.Y. 1975); *Wood v. Breier*, 54 F.R.D. 7, 11 (E.D. Wis. 1972).

²²⁷ 2012 WL 5386129, at *6.

²²⁸ In cases litigated shortly before an execution date, the fact that the inmate has not only a right to discovery but also a due process right to information should help militate in favor of a stay of execution. The case for a stay is especially strong where the state itself bears some responsibility for the

vitate the underlying Eighth Amendment right, especially when doing so would also violate core due process principles entitling the inmate to discovery.²²⁹ Moreover, to the extent that states have a strong interest in keeping some material secret, such as the identities of execution team members, courts can grant the inmate access to relevant information about the execution procedure's safety while simultaneously protecting those interests.²³⁰ Therefore, courts construing the federal common law of privilege should hold that state lethal injection procedures are not privileged (with the possible exception of the identity of execution team members and pharmacies providing the drugs).²³¹ And because this information is not privileged, lethal injection plaintiffs are entitled to it as part of the normal course of discovery.²³²

Finally, it is worth emphasizing that courts in other settings routinely permit robust discovery into prison operations. Prison inmates bringing Eighth Amendment claims challenging prison conditions, for instance, often get a broad range of discovery, including documents, depositions, expert reports, and more.²³³ This discovery into prison conditions and practices is, in fact, far more intrusive and fact-intensive than the materials pertaining to lethal injection.²³⁴ For example, discovery in *Brown v. Plata* included, *inter alia*, an expert report based on eight tours of California prisons, reports and ongoing monitoring from special masters, and extensive testimony from the parties.²³⁵ The fruits of this discovery included extensive details about "understaffing, inadequate facilities, and unsanitary and unsafe living conditions."²³⁶

need for the stay, such as when it alters its execution procedure at the last minute or refuses to comply with plaintiffs' timely requests for information. See *infra* 394–407 and accompanying text.

²²⁹ See *infra* notes 240–355 and accompanying text.

²³⁰ See *infra* notes 357–367 and accompanying text.

²³¹ See *infra* notes 357–393 and accompanying text.

²³² Because courts often do not grant lethal injection plaintiffs discovery into this material, the remainder of Part II examines the scope of the due process right to such information. This due process right may be relevant either as an independent legal argument in favor of disclosure or as part of an argument for why the federal common law of privilege should not obstruct discovery. See *supra* notes 206–231 and accompanying text.

²³³ See BEN M. CROUCH & JAMES W. MARQUART, AN APPEAL TO JUSTICE: LITIGATED REFORM OF TEXAS PRISONS 124 (1989) (detailing the lengthy discovery process in the prison conditions case *Ruiz v. Estelle*, in which the trial court enjoined prison officials from harassing plaintiff inmates); LARRY W. YACKLE, REFORM AND REGRET: THE STORY OF FEDERAL JUDICIAL INVOLVEMENT IN THE ALABAMA PRISON SYSTEM 71–73 (1989) (describing the importance of discovery in *Pugh v. Sullivan* prison conditions litigation); Claudia Angelos & James B. Jacobs, *Prison Overcrowding and the Law*, 478 ANNALS 100, 108 (1985) (noting that prison conditions suits generally entail extensive investigation of all aspects of prison life and pretrial discovery often takes years to complete).

²³⁴ See Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 398–99 (1997) (contrasting courts' relative "neglect" of method-of-execution claims with their more careful consideration of prison conditions cases).

²³⁵ See *Brown v. Plata*, 131 S. Ct. 1910, 1935 (2011).

²³⁶ *Id.*

Such discovery is obviously intrusive, but courts permit it nonetheless, because it is essential to the asserted Eighth Amendment claim.²³⁷ Lethal injection plaintiffs seek materials that are just as essential and far less extensive. Discovery into prison conditions can encompass far-ranging inquiries into the daily administration of prisons, potentially impacting prison security and state budgets.²³⁸ By contrast, lethal injection plaintiffs only seek discovery into materials related to one procedure that has nothing to do with the ordinary day-to-day operations of the prison. Additionally, whereas prison condition litigation examines issues over which prison officials ostensibly enjoy expertise, such as prison safety and security, lethal injection litigation explores a complicated, quasi-medical procedure that most prison officials do not understand.²³⁹ Furthermore, executions cannot be undone, so when courts ignore inmates' concerns, the resulting harm is irreparable. If anything, then, courts should be more, not less, inclined to grant a lethal injection plaintiff's discovery request.

B. The Inmate's Due Process Right to Information

This Section explores the due process right to information. Sub-section 1 examines core due process and fairness principles. Sub-section 2 explains why courts, rather than administrative agencies, must protect inmates' Eighth Amendment rights against excruciating executions. Sub-section 3 argues that even if some courts are reluctant to find an independent, Fourteenth Amendment due process right to information, they still should find such a right to information under the due process component of the Eighth Amendment.

1. Due Process, Basic Fairness, and the Right to Information

The Eighth Amendment creates a right against cruel and unusual punishment,²⁴⁰ and *Baze v. Rees* indicates that execution procedures that create a substantial risk of serious pain violate that right.²⁴¹ Without information about an

²³⁷ See, e.g., Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 720 (1993) (noting that successful prison-reform litigation requires extensive discovery).

²³⁸ See, e.g., MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* 39–51 (1998) (discussing complicated remedial factors in prison reform litigation).

²³⁹ See Berger, *supra* note 40, at 2083 (noting that many state execution team members lack basic understandings of the drugs and their risks). But see JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, *VERA INST. OF JUSTICE, CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS* 105 (2006), available at http://www.prisoncommission.org/pdfs/Confronting_Confinement.pdf, archived at <http://perma.cc/V3MF-GWKE> (questioning the expertise of many prison officials and the uniformity of American prison practices).

²⁴⁰ See U.S. CONST. amend VIII.

²⁴¹ See 553 U.S. 35, 50–52 (2008) (plurality opinion); *In re Kemmler*, 136 U.S. 436, 447 (1890) (“Punishments are cruel when they involve torture or a lingering death.”). As noted above, courts

execution procedure's details, courts simply cannot assess the degree of risk. To this extent, courts' refusal to force states to disclose key details of their execution procedures effectively strips the condemned of their Eighth Amendment protections.²⁴²

Due process clearly covers inmates challenging their method of execution. The U.S. Supreme Court held in 1970 in *Goldberg v. Kelly* that individuals "condemned to suffer grievous loss" enjoy due process protections.²⁴³ The question of whether an individual is condemned to "grievous loss" depends both on the "weight" of the individual's interest and "whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment."²⁴⁴ By any measure, an inmate's Eighth Amendment right protecting him against an excruciating execution is "weighty."²⁴⁵ And whether one conceives of the inmate's Eighth Amendment right against an excruciating execution as a liberty interest or a "residual life interest,"²⁴⁶ that interest is plainly within the Fourteenth Amendment's contemplation.²⁴⁷

Due process requires that the government give affected parties both notice of its plans and an opportunity to be heard.²⁴⁸ The Court has likewise recognized that the state must provide this notice and a hearing "at a meaningful time and in a meaningful manner."²⁴⁹ Notice, thus, must "permit adequate preparation for . . . an impending hearing,"²⁵⁰ during which the inmate must

disagree as to the exact holding of *Baze*, but they generally agree that an Eighth Amendment analysis centers on the risk of pain created by an execution procedure. *See supra* notes 78–81 and accompanying text.

²⁴² *See* *Beatty v. Brewer*, 649 F.3d. 1071, 1076 (9th Cir. 2011) (Reinhardt, J., dissenting) (arguing that Eighth Amendment protections against painful executions become "meaningless" if inmates do not have notice of the execution procedure).

²⁴³ 397 U.S. 254, 263 (1970) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

²⁴⁴ *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (citing *Fuentes v. Shevin*, 407 U.S. 67 (1972)); *see Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989).

²⁴⁵ Far less weighty interests enjoy due process protection. *See, e.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538–41 (1985) (protecting property interest in civil servant job); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9–11 (1978) (protecting interest in receiving public utilities).

²⁴⁶ *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 281 (1998) (noting that death row inmate possesses "residual life interest").

²⁴⁷ *See Roth v. Bd. of Regents*, 408 U.S. 564, 572 (1972) ("In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed.").

²⁴⁸ *See Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) ("Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." (quoting *Baldwin v. Hale*, 68 (1 Wall.) 223, 233 (1863))); *cf. WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE* § 2.4 (4th ed. 2007) (noting that due process has "its own individual content" and requires "fundamental fairness" beyond what is required in the particular provisions of the Bill of Rights).

²⁴⁹ *See Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (quoting *Fuentes*, 407 U.S. at 80); *Baldwin* 68 U.S. (1 Wall.) at 233.

²⁵⁰ *Memphis Light*, 436 U.S. at 14.

have “an opportunity to present [his] objections.”²⁵¹ Without such procedures, a legal system can hardly be said to be fair or just. As the Court itself once stated, “procedural devices rooted in experience were written into the Bill of Rights not as abstract rubrics in an elegant code but in order to assure fairness and justice before any person could be deprived of ‘life, liberty, or property.’”²⁵²

The due process requirement that government must afford individuals meaningful hearings is not limited to criminal trials but extends after a conviction. For example, in *Morrissey v. Brewer*,²⁵³ the Supreme Court held that due process requires that the state provide a hearing for paroled prisoners before revoking their parole.²⁵⁴ Due process takes on still additional weight in the death penalty context. In *Ford v. Wainwright*, the Court held that the Eighth Amendment’s prohibition on executing the insane required states to provide capital inmates adequate procedures to demonstrate their insanity.²⁵⁵ In so holding, the Court emphasized “the heightened concern for fairness and accuracy that has characterized our review of the process requisite to the taking of a human life.”²⁵⁶

To ensure this meaningful hearing, due process sometimes requires that the state grant both the aggrieved individual and the tribunal access to important information. For instance, in *Morgan v. Illinois*, the Supreme Court held that in order to protect the criminal defendant’s Sixth Amendment right to an impartial jury,²⁵⁷ the trial court must permit the defendant an opportunity to conduct adequate *voir dire* to gather sufficient information to make challenges to potential jurors.²⁵⁸ Specifically, the Court found that the defense had a constitutional right to ask potential jurors whether they would automatically vote for the death penalty in every case.²⁵⁹ As the Court put it, “[w]ere *voir dire* not available to lay bare the foundation of petitioner’s challenge for cause against those prospective jurors who would always impose death following conviction, his right not to be tried by such jurors would be rendered as nugatory.”²⁶⁰ *Morgan*, thus, emphasized that due process requires not merely *some* procedures,

²⁵¹ *Mullane*, 339 U.S. at 314.

²⁵² *Adams v. United States ex rel. McCan*, 317 U.S. 269, 276 (1942).

²⁵³ 408 U.S. 471, 490 (1972).

²⁵⁴ *See id.* at 481–82.

²⁵⁵ 477 U.S. 399, 402, 417–18 (1986).

²⁵⁶ *Id.* at 414; *see Moore v. Illinois* 434 U.S. 220, 231 (1977) (holding that defendants have a right to the presence of counsel at all in-person eyewitness identifications that occur after judicial proceedings have begun to protect against unfair suggestiveness).

²⁵⁷ *See* U.S. CONST. amend. VI.

²⁵⁸ *See* 504 U.S. 719, 728–29 (1992).

²⁵⁹ *See id.*

²⁶⁰ *Id.* at 733.

but meaningful ones that afford individuals the information needed to protect other constitutional rights.

These due process principles are not just matters of individual rights but are also an important component of a healthy democracy. The “heart of the matter,” as Justice Frankfurter once wrote, “is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.”²⁶¹ Our country relies on an adversarial legal system that presumes that “[n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.”²⁶² By denying inmates notice of the procedures by which they will be executed and a fair hearing to challenge those procedures, courts effectively block inmates’ access to any forum that could protect their asserted rights, thereby undermining core principles of our adversarial legal system.

Indeed, when a court rejects an inmate’s request for information about the state’s planned execution procedure, it denies *itself* the opportunity to make an informed judgment about the procedure’s safety. In various contexts, the Court has explained that the state must disclose information not only to aid the requesting party but also the tribunal itself. For example, when the Court in *Ford* held that the states must provide capital inmates adequate procedures to demonstrate their insanity, it emphasized the *tribunal’s* need for full information.²⁶³ The panel, the Court insisted, must “have before it all possible relevant information about the individual defendant whose fate it must determine.”²⁶⁴ Without the inmate’s participation, “the factfinder loses the substantial benefit of potentially probative information. The result is a much greater likelihood of an erroneous decision.”²⁶⁵

Similarly, in 1963, in the seminal case *Brady v. Maryland*, the Court held that due process requires the government to provide to the criminal defendant evidence that “would tend to exculpate him or reduce the penalty,”²⁶⁶ and to do so in sufficient time to permit the defendant to make effective use of the evidence at trial.²⁶⁷ As in *Ford*, the Court emphasized not just the individual’s interest in a fair proceeding, but also *courts’* need for a thorough record. The

²⁶¹ *McGrath*, 341 U.S. at 170–72 (Frankfurter, J., concurring); *see also Fuentes*, 407 U.S. at 81.

²⁶² *McGrath*, 341 U.S. at 170 (Frankfurter, J., concurring).

²⁶³ *Ford*, 477 U.S. at 417–18.

²⁶⁴ *Id.* at 413.

²⁶⁵ *Id.* at 414.

²⁶⁶ 373 U.S. 83, 87–88 (1963).

²⁶⁷ *See, e.g., United States v. Coppa*, 267 F.3d 132, 142–43 (2d Cir. 2011); *United States v. Woodley*, 9 F.3d 774, 777 (9th Cir. 1993); 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 24.3(b) (3d ed. 2004).

integrity of the judicial system, *Brady* explained, requires courts to proceed with full information.²⁶⁸ Moreover, subsequent cases have clarified that courts should fashion procedures to ensure that they have the information to resolve cases fairly and accurately. For instance, where disclosure allegedly involves confidential state information, due process requires the trial court to review confidential state information *in camera* to determine whether the state withheld material that may have assisted the defense.²⁶⁹ When the trial court finds such material, it must order a new trial.²⁷⁰

Though these precedents establish that due process principles encompass a right to information needed to assure meaningful proceedings, courts may nevertheless worry about intruding too much on state prerogatives. Due process analysis, after all, must weigh the individual's interests against the state's interests. In *Mathews v. Eldridge*, the Court announced a balancing test for determining which procedures the government owes to individuals deprived of life, liberty, or property.²⁷¹ *Mathews* weighed three factors: the private interest affected by the official action, the risk of erroneous deprivation through existing procedures, and the government's interest in retaining the status quo.²⁷² Although *Mathews* involved the administrative procedures required before the termination of disability payments,²⁷³ the Supreme Court also uses it to resolve "the tension that often exists between the autonomy that the Government asserts is necessary in order to pursue effectively a particular goal and the process that a citizen contends he is due before he is deprived of a constitutional right."²⁷⁴

Viewed through the lens of the *Mathews* factors, the inmate's right to disclosure is usually strong.²⁷⁵ The inmate's private interest against a painful execution is not a mere statutory entitlement, but a constitutional right. Individual rights are the most precious private interests.²⁷⁶ The right to be free from an

²⁶⁸ See *Brady*, 373 U.S. at 87 ("Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.").

²⁶⁹ See *Pennsylvania v. Ritchie*, 480 U.S. 39, 58–60 (1987) (requiring that confidential information be submitted to trial court for *in camera* review to assure defendant a "fair trial").

²⁷⁰ See *id.*

²⁷¹ See 424 U.S. 319, 334 (1976).

²⁷² See *id.*; *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (listing *Mathews* factors to determine whether "the State to provide an indigent defendant with access to competent psychiatric assistance in preparing the defense").

²⁷³ See 424 U.S. at 323.

²⁷⁴ *Hamdi*, 542 U.S. at 528–29.

²⁷⁵ Obviously, the particulars may differ from case to case. In general, however, this analysis applies.

²⁷⁶ See *Ake*, 470 U.S. at 78 (finding that "[t]he private interest in . . . an individual's life or liberty . . . is almost uniquely compelling").

excruciating death therefore weighs heavily in the individual's favor.²⁷⁷ Moreover, because death is final, the injury inflicted on the individual is irreparable, thus further adding to the weight of the individual's interest.²⁷⁸

The second *Mathews* factor—existing procedural safeguards—also militates in favor of disclosure. Without the opportunity to review the protocol's key facts and challenge them in court, an inmate receives *no* meaningful process about the method of his execution. To be sure, many states permit access to some information about their execution protocols, but they typically withhold the information that speaks most directly to the risk of pain. They similarly often withhold recent changes to the procedure. The denial of information, thus, substantially heightens the risk of an Eighth Amendment violation, because the execution procedure's most important details entirely escape judicial review. Moreover, although the risk of pain will differ from case to case, that risk may well increase if states know they can keep their execution procedures secret indefinitely.²⁷⁹

Finally, as discussed in more detail below, under the third *Mathews* factor, the government's interests against disclosure are usually modest.²⁸⁰ Indeed, the government has no interest in using an unconstitutional execution procedure.²⁸¹ Of course, states assert an interest in preserving the death penalty and worry that the disclosure of their drug providers' identities will result in anti-death penalty activists pressuring pharmacies to stop providing chemicals for executions.²⁸² States may further contend that disclosing information about the execution team will subject team members to harassment and public ridicule.²⁸³ However understandable, these concerns underestimate courts' ability

²⁷⁷ See *Baze*, 553 U.S. at 66 (Stevens, J., concurring) ("Finally, given the real risk of error in this class of cases, the irrevocable nature of the consequences is of decisive importance to me.").

²⁷⁸ See *Gardner v. Florida*, 430 U.S. 349, 357 (1977) (plurality opinion) ("[D]eath is a different kind of punishment from any other which may be imposed in this country . . . in both its severity and its finality."); *Barefoot v. Estelle*, 463 U.S. 880, 913 (1983) (Marshall, J., dissenting) ("Given the irreversible nature of the death penalty, it would be hard to think of any class of cases for which summary procedures would be less appropriate than capital cases presenting a substantial constitutional issue."); *Evans v. Bennett*, 440 U.S. 1301, 1306 (1979) (granting stay and noting "irreversible nature of the death penalty" as reason to grant stay).

²⁷⁹ See *infra* notes 457–485 and accompanying text.

²⁸⁰ See *infra* notes 356–456 and accompanying text.

²⁸¹ Cf. *Loudermill*, 470 U.S. at 544–45 (1985) (noting that the government and petitioner share some interests in common).

²⁸² See, e.g., *Owens v. Hill*, 758 S.E.2d 794, 805 (Ga. 2014) (holding that without confidentiality, pharmacists may be unwilling to participate in executions); *Whitaker v. Livingston*, CA H-13-2901, 2013 U.S. Dist. LEXIS 144367, *7 (S.D. Tex. Oct. 8, 2013) (noting that the compounding pharmacy was demanding the return of lethal drugs "because it was being harassed").

²⁸³ See, e.g., *Owens*, 758 S.E.2d at 805 (justifying privacy because of the state's concern that execution team members may be subject to "harassment or some other form of retaliation" if their identities are revealed).

to craft remedies that accommodate the inmates' right to information without threatening these state interests.²⁸⁴ For example, as discussed below, courts can order neutral testing of the states' drugs to assure chemical purity and potency without compromising the anonymity of the providing compounding pharmacy.²⁸⁵ Courts can also craft protective orders that grant inmates the information they need to evaluate the safety of execution procedures, such as the *qualifications* of execution team members, while simultaneously guarding against disclosure of sensitive information, such as the *identity* of the team members.²⁸⁶

States also argue that vindicating the right to information will delay executions and obstruct the timely administration of justice.²⁸⁷ In some cases, this argument may be legally persuasive in theory, because the burden for obtaining a stay of execution is high.²⁸⁸ Nevertheless, in practice, this argument often obscures the extent to which the state itself bears the responsibility for that delay, either because it changed its procedure shortly before a scheduled execution or because it has denied an inmate's timely request for details about the procedure.²⁸⁹ The *Mathews* test, then, usually weighs strongly in favor of disclosure.²⁹⁰

This outcome may be unpopular with some people, but the state's interests in these cases, quite simply, do not excuse the denial of fair hearings. As one dissenting judge put it:

[M]any people believe that there should be no appeals whatsoever following the jury's imposition of the death sentence. The law, on the other hand, provides that certain procedures must be followed before a death sentence may be carried out. Although it may not win a popu-

²⁸⁴ Cf. *First Amendment Coal. v. Woodford*, 299 F.3d 868 at 884 (weighing "strongly" the fact that there exists a "ready, low-cost alternative that would fully accommodate the public's First Amendment right of access and adequately address defendants' security concerns as well").

²⁸⁵ See *infra* notes 368–384 and accompanying text.

²⁸⁶ See *infra* notes 357–367 and accompanying text.

²⁸⁷ See *Nelson v. Campbell*, 541 U.S. 637, 649 (2004) ("A stay is an equitable remedy, and '[e]quity must take into consideration the State's strong interest in proceeding with its judgment and . . . attempt[s] at manipulation.'" (quoting *Gomez v. U.S. Dist. Court*, 503 U.S. 653, 654 (1992))); see also *Sepulvado v. Jindal*, 729 F.3d 413, 420 (5th Cir. 2013); *Zink* Opposition Suggestions, *supra* note 7, at 4.

²⁸⁸ See *Barefoot*, 463 U.S. at 895 (holding that a stay of execution requires a reasonable probability that four members of the Court grant of certiorari, a significant possibility of success on the merits, and a likelihood that irreparable harm will result if a stay is not granted).

²⁸⁹ See *supra* notes 1–16, 141–174 and accompanying text.

²⁹⁰ See *Taylor v. Bowersox*, No. 14-1403, slip op. at 3 (8th Cir. Feb. 25, 2014) (Bye, J., dissenting) (disagreeing with denial of petition for rehearing en banc and denial of motion to stay execution, noting that Taylor did not ask for anything that would "place an undue burden on Missouri").

larity contest in any given case, this scheme was adopted to ensure that every individual would be accorded due process of law.²⁹¹

2. The Importance of a Judicial Determination of the Right

It is important to emphasize that due process in this context requires a *judicial* adjudication of the Eighth Amendment right. The protection of constitutional rights is a quintessential judicial function. Although some judges, to their credit, have recognized their constitutional duty to examine closely execution procedures before them,²⁹² many courts have abdicated their oversight of these constitutional matters to the very administrative agents whose procedures they should be reviewing.²⁹³ Courts, in other words, often give departments of corrections the benefit of the doubt, assuming without any study that their execution procedures pass constitutional muster.²⁹⁴

Such reflexive hyper-deference to departments of correction is wholly inappropriate.²⁹⁵ Most correctional departments have developed lethal injection protocols haphazardly and without oversight, transparency, or expertise.²⁹⁶ As Justice Stevens pointed out in *Baze*, states usually operate “with no specialized medical knowledge and without the benefit of expert assistance or guidance.”²⁹⁷ Given that technical expertise is usually one of the primary justifications for delegating matters to administrative agencies,²⁹⁸ the agencies’ lack of expertise in lethal injection highlights the need for external review of their actions.²⁹⁹

Correctional officials also have a strong, self-interested reason to consider their own procedures legitimate. Although state statutes sometimes indicate the kinds of drugs to be used,³⁰⁰ often correctional departments must make these

²⁹¹ See *Nicklasson v. Lombardi*, No. 13-3664, slip op. at 6–7 (8th Cir. Dec. 23, 2013) (Bye, J., dissenting) (disagreeing with denial of petition for rehearing en banc and denial of motion to stay execution).

²⁹² See *supra* notes 195–205 and accompanying text.

²⁹³ See *Berger*, *supra* note 22, at 312.

²⁹⁴ See *id.*

²⁹⁵ See *Berger*, *supra* note 40, at 2074–77.

²⁹⁶ See *id.* at 2082–84; *supra* notes 48–140 and accompanying text.

²⁹⁷ *Baze*, 553 U.S. at 75 (Stevens, J., concurring).

²⁹⁸ See JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 19 (1985) (explaining the desire for expertise rather than lay or political judgment provided much of the impetus for the creation of administrative agencies).

²⁹⁹ See *Berger*, *supra* note 40, at 2067–70 (discussing the importance of administrative expertise in determining the deference due to administrative agencies in individual rights cases).

³⁰⁰ See, e.g., N.C. GEN. STAT. § 15-187 (2013) (“Any person convicted of a criminal offense and sentenced to death shall be executed only by the administration of a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent.”); N.H. REV. STAT. ANN. § 630:5 (XIII) (West 2007) (“The punishment of death shall be inflicted by continuous, intravenous admin-

choices themselves,³⁰¹ and, even where they do not, they typically design and implement the procedures' details.³⁰² Even the most fair-minded correctional officials may believe in the viability of procedures designed by respected colleagues.³⁰³ Blind deference to such administrative action defies common sense, especially when constitutional rights are at stake.³⁰⁴ As Justice Frankfurter once observed, administrative agents should not be trusted as impartial arbiters of their own policies.³⁰⁵ Indeed, the whole theory behind the Bill of Rights assumes that "people cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights."³⁰⁶

Basic institutional analysis further highlights the dangers of leaving constitutional questions solely in the hands of administrative agencies. While many people of good faith work for correctional departments, their mandate in this area is to kill the condemned with apparently unproblematic execution protocols that comply with the broad parameters set by the legislature. Correctional departments' primary obligation in this area, then, is not to protect Eighth Amendment rights, but to create affordable, workable execution procedures that do not appear to cause suffering. Many states' continued use of the paralytic, pancuronium bromide, demonstrates their paramount interest in an execution procedure that appears peaceful.³⁰⁷ Thus, like other administrative agents, correctional officials are prone to tunnel vision, focusing on their institutional goal (executing inmates) at the possible expense of constitutional val-

istration of a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent.").

³⁰¹ See, e.g., ARIZ. REV. STAT. § 13-757(A) (2013) ("The penalty of death shall be inflicted by an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, under the supervision of the state department of corrections."); GA. CODE ANN., § 17-10-38 (2013) ("All persons who have been convicted of a capital offense and have had imposed upon them a sentence of death shall suffer such punishment by lethal injection."); OKLA. STAT. ANN. tit. 22, § 1014 (West Supp. 2014) ("The punishment of death shall be carried out by the administration of a lethal quantity of a drug or drugs until death is pronounced by a licensed physician according to accepted standards of medical practice.").

³⁰² See, e.g., Berger, *supra* note 142, at 59–60 (explaining that execution statutes delegated substantial authority to departments of corrections).

³⁰³ Cf. Daniel P. Forbes, *Are Some Entrepreneurs More Overconfident Than Others?*, 20 J. BUS. VENTURING 623, 624 (2005) (describing the overconfidence bias).

³⁰⁴ See Berger, *supra* note 40, at 2054–74.

³⁰⁵ See *McGrath*, 341 U.S. at 171 (Frankfurter, J. concurring) ("That a conclusion satisfies one's private conscience does not attest its reliability.").

³⁰⁶ *Id.*

³⁰⁷ See Alper, *supra* note 58, at 833 (arguing that states' "insistence on the 'dignity' of the execution—even at the expense of knowing whether the execution is actually humane . . . confirms the suspicion that the use of pancuronium is designed to maintain appearances at all costs"); DEATH PENALTY INFORMATION CENTER, *supra* note 88.

ues.³⁰⁸ Indeed, if anything, correctional departments may be especially prone to such constitutional neglect, given that they are often exempted from ordinary administrative accountability mechanisms, like state Administrative Procedure Acts and Freedom of Information Acts.³⁰⁹

In light of this agency tunnel vision, courts should recognize that they are better situated than correctional departments to determine the constitutionality of execution procedures.³¹⁰ Article III of the U.S. Constitution, after all, insulates judges from direct political pressures, thereby encouraging impartial decision-making.³¹¹ Additionally, judicial processes are designed to permit adversaries to present their facts and arguments so as to expose the decision-maker to both sides of a case. The theory, of course, is that courts, unlike some other governmental entities, will be better situated to neutrally apply law (including constitutional law) to the facts. The judiciary's basic structures, therefore, encourage judges to consider constitutional principles more carefully than other governmental officials do, allowing courts to take the "long view" of issues, rather than caving to immediate political pressures.³¹²

Relatedly, unlike administrative agencies, which typically have narrow statutory mandates, courts have broader societal commitments to the rule of law and the Constitution. Whereas agencies can often be fairly accused of tunnel vision, "[c]ourts . . . do not suffer congenitally from this myopia; their general jurisdiction gives them a broad perspective which no agency can have."³¹³ As Alexander Bickel put it:

³⁰⁸ See, e.g., Stephen Breyer, *The Executive Branch, Administrative Action, and Comparative Expertise*, 32 CARDOZO L. REV. 2189, 2195 (2011); Henry P. Monaghan, *First Amendment Due Process*, 83 HARV. L. REV. 518, 523 (1970). Professor Monaghan's title helped inspire my own.

³⁰⁹ See, e.g., MO. ANN. STAT. § 536.010(6)(k) (West 2009) (exempting "statement concerning only inmates of an institution under the control of the department of corrections" from the definition of a "rule"); TENN. CODE ANN. § 4-5-102(10)(G) (2009) (exempting "statements concerning inmates of a correctional facility"); *Hightower v. Donald*, No. 2007-135682, slip op. at 4 (Ga. Super. Ct. July 16, 2007) ("[T]he promulgation of these protocols regarding lethal injection by the [Georgia] Department of Corrections are not subject to the requirements of the APA . . ."); *Middleton v. Mo. Dep't of Corrections*, No. SC 89571, 2009 WL 454279, at *1 (Mo. Feb. 24, 2009) (holding that an execution protocol is not a rule and is therefore not subject to the State APA); *Abdur' Rahman v. Bredesen*, 181 S.W.3d 292, 311 (Tenn. 2005) (interpreting Tennessee Uniform Administrative Procedure Act not to reach lethal injection); *supra* notes 152, 219 and accompanying text.

³¹⁰ See Glen Staszewski, *Statutory Interpretation as Contestatory Democracy*, 55 WM. & MARY L. REV. 221, 257 (2013) ("[A]dministrative discretion has always been feared on the grounds that agencies might adopt 'tunnel vision . . .'"); Berger, *supra* note 40, at 2074-77 (arguing that judicial deference to administrative agencies should hinge on how they do their jobs).

³¹¹ See U.S. CONST. art. III, § 1 (ensuring life tenure and salary protection for judges); Monaghan, *supra* note 308, at 522-23.

³¹² See Monaghan, *supra* note 308, at 523.

³¹³ *Id.*

Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government. This is crucial in sorting out the enduring values of a society, and it is not something that institutions can do well occasionally, while operating for the most part with a different set of gears.³¹⁴

Even if this institutional comparison may be contestable in particular instances, in the death penalty context, states' efforts to procure lethal drugs from any willing source strongly suggest that they care less about Eighth Amendment values than about carrying out executions.³¹⁵

The Supreme Court in other contexts has recognized the dangers of entrusting individual rights to administrative agents without sufficient judicial review. In *Ford*, the Court faulted Florida for vesting the executive branch with sole authority to determine whether inmates were sane enough to execute.³¹⁶ As the Court emphasized, "[i]n no other circumstance . . . is the vindication of a constitutional right entrusted to the unreviewable discretion of an administrative tribunal."³¹⁷

This principle extends well beyond the Eighth Amendment context. In 1965, in *Freedman v. Maryland*,³¹⁸ for instance, the Court considered a Maryland statute that required movie theaters to submit films they wished to show to the State Board of Censors prior to screening.³¹⁹ The Court unanimously invalidated Maryland's censorship scheme that had vested unfettered discretion in the State Board. In particular, the Court emphasized that the State's administrative system, without meaningful judicial review, was inadequate to protecting free speech. "[B]ecause only a *judicial* determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression," wrote the Court, "only a procedure requiring a judicial determination suffices to impose a valid final restraint."³²⁰

Along similar lines, in *Regents of the University of California v. Bakke*, the Court struck down the affirmative action program of the Medical School of the University of California at Davis, in part because, "isolated segments of our vast governmental structures are not competent to make those decisions

³¹⁴ ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 25–26 (1962); see Monaghan, *supra* note 308, at 523–24 (discussing Bickel and agency tunnel vision).

³¹⁵ See *supra* notes 89–121 and accompanying text; cf. Monaghan, *supra* note 308, at 523.

³¹⁶ See 477 U.S. at 416 ("Perhaps the most striking defect [of Florida's procedure] . . . is the State's placement of the decision wholly within the executive branch.").

³¹⁷ *Id.*

³¹⁸ 380 U.S. 51, 52 (1965).

³¹⁹ See *id.* at 52–53.

³²⁰ *Id.* at 58 (emphasis added); see *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150 (1969).

[about affirmative action], at least in the absence of legislative mandates and legislatively determined criteria.”³²¹ And in *Hampton v. Mow Sun Wong*, the Court invalidated Civil Service Commission regulations forbidding the employment of legal resident aliens. In so holding, the Court emphasized that the Commission, which had acted without Congressional or Presidential instructions, lacked the democratic pedigree to take steps that raised serious equal protection and due process questions.³²² Of course, much more could be said about these cases, but collectively they help establish that courts should not relinquish to administrative agencies their duty to safeguard individual rights.

In part because non-judicial adjudicative hearings are sometimes inadequate, due process encompasses a constitutional right of access to courts—a right the Supreme Court previously held must be “adequate, effective, and meaningful.”³²³ This right extends beyond the mere theoretical option of bringing a lawsuit and encompasses certain kinds of affirmative assistance that prisoners may need to help ensure a fair day in court.³²⁴ This right, thus, advances the general and broad due process notion that the aggrieved have “a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.”³²⁵

In keeping with these precedents, it should be clear that a judicial determination is essential to protecting inmates’ Eighth Amendment rights.³²⁶ Meaningful judicial review, however, can only occur if the court has access to all relevant details of the execution procedure. Without such information, courts rule on constitutional claims about which they know very little. Thus, given the nature of our adversarial legal system, judicial consideration of lethal injection procedures necessarily requires that inmates be permitted to study the procedures’ details in advance so that they can present the dangers in court.³²⁷ Presumably, in some instances, the procedure will present no meaningful risk

³²¹ 438 U.S. 265, 309 (1978); see *Berger*, *supra* note 40, at 2031–32, 2040–42.

³²² 426 U.S. 88, 105 (1976) (finding it “perfectly clear that neither Congress nor the President has ever required the Civil Service Commission to adopt the citizenship requirement as a condition of eligibility for employment in the federal civil service”); *Berger*, *supra* note 40, at 2047–48.

³²³ *Bounds v. Smith*, 430 U.S. 817, 822–23 (1977).

³²⁴ See *id.* at 821 (holding that prisoners “have a constitutional right of access to the courts”); see also *Johnson v. Avery*, 393 U.S. 483 (1969) (holding that access to courts prohibits states from denying inmates a jailhouse lawyer to assist them); *Burns v. Ohio*, 360 U.S. 252, 257 (1959) (holding that access to courts allows indigent prisoners to forego normal fees for filing appeals and habeas corpus petitions); *Griffin v. Illinois*, 351 U.S. 12, 20 (1956).

³²⁵ *Lewis v. Casey*, 518 U.S. 343, 351 (1996) (quoting *Bounds*, 430 U.S. at 825); see *Murray v. Giarratano*, 492 U.S. 1, 11 n.6 (1989) (plurality opinion) (noting that the *Bounds* right can be interpreted as a due process right).

³²⁶ See *Loudermill*, 470 U.S. at 541 (holding that the process required by due process is a constitutional question that must be determined by the judiciary).

³²⁷ See *supra* notes 206–325 and accompanying text.

of pain, but unless a court has already upheld the same procedure the state plans to use, it cannot take the safety of an execution procedure for granted. On the contrary, given the history of botched executions,³²⁸ courts should recognize that lethal injection creates serious risks requiring careful judicial study of states' specific plans.

3. The Due Process Component of the Eighth Amendment

Although inmates have a strong due process argument in favor of receiving relevant information about states' lethal injection procedures, many lower courts implicitly reject the existence of an independent due process right to this information.³²⁹ These courts instead tether the right to disclosure to the Eighth Amendment claim, finding that flaws within the Eighth Amendment claim necessarily defeat the inmate's right to information. For example, in 2014, in *In re Lombardi*, the Eighth Circuit, sitting *en banc*, permitted the State to withhold its execution protocol details, because the inmates failed to assert a viable Eighth Amendment claim.³³⁰ Specifically, the Eighth Circuit faulted the inmates for failing to satisfy *Baze*'s requirement that they proffer an alternative method of execution.³³¹ Because the underlying Eighth Amendment claim failed, the court held that the inmates were not entitled to discovery about the State's execution procedures.³³² Though the Eighth Circuit did not explicitly state that any asserted right to disclosure could only exist as a component of the Eighth Amendment right, its analysis suggested that conclusion and did not contemplate the possibility of a free-floating due process right.

In 2013, the Fifth Circuit in *Whitaker v. Livingston* reasoned similarly, writing, "plaintiffs' access-to-the-courts argument still hinges on their ability to show a potential Eighth Amendment violation. One is not entitled to access to the courts merely to argue that there might be some remote possibility of some constitutional violation."³³³ Other courts rejecting death row inmates' asserted due process right to information seem to follow this line of reasoning, albeit somewhat obscurely.³³⁴

³²⁸ See Berger, *supra* note 22, at 263–73; Denno, *supra* note 17, at 1339–45; *supra* notes 117–138 and accompanying text.

³²⁹ See *supra* notes 176–205 and accompanying text.

³³⁰ 741 F.3d 888, 895–96 (8th Cir. 2014) (*en banc*).

³³¹ See *id.*

³³² See *id.* at 896.

³³³ *Whitaker*, 732 F.3d at 467.

³³⁴ See, e.g., *Sepulvado*, 729 F.3d at 418–19 (distinguishing *Arthur v. Thomas*, 674 F.3d 1257, 1263–64 (11th Cir. 2012), on the grounds that *Arthur* grounded its decision in the Eighth Amendment, but refrained from reaching the due process question); *Powell v. Thomas*, 784 F. Supp. 2d 1270, 1282–83 (M.D. Ala. 2011) (rejecting the proposition that a condemned inmate had an independent due process right to receive notice and a hearing regarding a substitution of drugs in a lethal injection

Courts in these cases undervalued important due process principles examined above.³³⁵ Indeed, it seems backwards to treat the Eighth Amendment claim as antecedent to the due process right to information, because the state's secrecy makes it impossible for the plaintiff to mount a viable challenge to its execution procedure. That said, plaintiffs seeking this information must recognize that they face sizable obstacles. Whether correctly or not, some courts apparently see the due process right as a component of the Eighth Amendment right, not as a free-floating claim. Moreover, the Supreme Court in *District Attorney's Office v. Osborne* viewed skeptically an asserted independent due process right to information, albeit in a different context.³³⁶ Foundational due process principles clearly point towards a right to information here, but, in practice, courts may resist such a right.

In light of these difficulties, inmates seeking this information ought to assert not only an independent Fifth or Fourteenth Amendment due process claim,³³⁷ but also an Eighth Amendment due process claim. While both claims rely on the same notions of due process and fairness, courts seem to worry that a free-standing due process right to information is limitless and therefore too burdensome on the government. By contrast, when framed as a due process component of the Eighth Amendment, the right to information is tethered closely to the assertion of a substantive constitutional right. So framed, the due process right seems more essential, given that the information in question is necessary to protect another constitutional liberty. Furthermore, the right to information under this view is more easily cabined. Inmates would receive all information bearing on the execution procedure's risk of substantial pain, but not information unconnected to that Eighth Amendment inquiry. In light of these factors, the due process component of the Eighth Amendment is probably

procedure); see also *Arthur*, 674 F.3d at 1263–64 (deciding the death row issue based on the Eighth Amendment, while refusing to address the due process question).

³³⁵ See *supra* notes 240–328 and accompanying text.

³³⁶ 557 U.S. 52, 67–75 (2009) (rejecting prison inmate's § 1983 claim asserting a due process right to DNA evidence to establish his innocence).

³³⁷ If courts approach this question as an independent due process question, the Fourteenth Amendment Due Process Clause would apply in actions against state governments, whereas the Fifth Amendment Due Process Clause would apply against the federal government. See *Hurtado v. California*, 110 U.S. 516, 535 (1884) (explaining that the Fourteenth Amendment Due Process Clause applies to states in the same way that the Fifth Amendment Due Process Clause applies to the federal government). Substantively, the nature of the two inquiries would be the same. See *id.*; see also *Bolling v. Sharpe*, 347 U.S. 497, 498–99 (1954). But see Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 495–500 (2010) (arguing that the meaning of the term “due process” encompassed procedural due process when the Fifth Amendment was ratified in 1791 but expanded to include some substantive content by the time the Fourteenth Amendment was ratified in 1868).

more likely to resonate with more courts than an independent due process right to information.

The U.S. Supreme Court in other contexts has already recognized a due process component of other constitutional rights. For example, as discussed above, *Morgan v. Illinois* held that trial courts must allow criminal defendants to ask potential jurors during *voir dire* whether they would automatically vote for the death penalty.³³⁸ Such information, the Court reasoned, was necessary to allow the criminal defendant to protect his Sixth Amendment right to an impartial jury.³³⁹ Significantly, *Morgan* emphasized that this right to information about potential jurors' views arose not from the Sixth Amendment alone, but also from "the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment."³⁴⁰

Similarly, as Henry Monaghan has demonstrated, the Court recognized a set of hybrid procedural rights in a series of free speech licensing cases. For example, in cases like *Freedman* and *Shuttlesworth v. City of Birmingham*, the Court fashioned a series of "procedural safeguards designed to obviate the dangers of a censorship system" threatening free speech.³⁴¹ Far from being anomalous, then, the right to information through the due process component of the Eighth Amendment fits with a long-established judicial practice of recognizing procedural rights needed to protect other substantive rights.

When inmates do assert the right to information through the due process component of the Eighth Amendment, they must be sure to allege a viable Eighth Amendment claim.³⁴² Consequently, an inmate's complaint should, following *Baze*, assert that the challenged procedure creates a substantial risk of serious harm.³⁴³ In many cases, inmates know which kinds of drugs the state plans to use,³⁴⁴ so the complaint can simply allege the risks associated with those drugs. If the state plans to use compounded pentobarbital, for instance, the inmate can explain the dangers that the drug will be impure, tainted, or otherwise flawed and therefore painful.³⁴⁵ He can similarly point to the

³³⁸ *Morgan*, 504 U.S. at 729–30; see *supra* notes 257–260 and accompanying text.

³³⁹ See U.S. CONST. amend. VI; *Morgan*, 504 U.S. at 729.

³⁴⁰ *Morgan*, 504 U.S. at 729.

³⁴¹ Monaghan, *supra* note 308, at 518 (quoting *Freedman*, 380 U.S. at 58); see *Shuttlesworth*, 394 U.S. at 150; David S. Bogen, *First Amendment Ancillary Doctrines*, 37 MD. L. REV. 679, 687 (1978).

³⁴² In extreme cases where the state has provided absolutely no information about its intended execution procedure, the inmate's independent due process claim would be very strong, because the state would have intentionally deprived the inmate of his right to know anything about the method of execution. As discussed above, however, usually the states provide the inmate with some information to allege dangers associated with particular types of lethal injection procedures. See *supra* notes 163–172 and accompanying text.

³⁴³ See *Baze*, 553 U.S. at 52.

³⁴⁴ See *supra* notes 7–12, 163–166 and accompanying text.

³⁴⁵ See *supra* notes 103–116 and accompanying text.

botched executions of Eric Robert and Michael Lee Wilson as examples of compounded pentobarbital's dangers.³⁴⁶ Alternatively, if the state still uses a three-drug protocol, the inmate can explain the grave risks of excruciating pain if the first drug does not render the inmate unconscious.³⁴⁷ He can also identify, *inter alia*, the botched three-drug executions of Clayton Lockett and Angel Diaz.³⁴⁸ In all events, the gravamen of the complaint would be that the drugs selected create certain risks of pain, and that the constitutionality of the procedure therefore hinges on the particulars of the state's drugs and procedures, which the state must allow the plaintiff to inspect.

In addition to alleging a substantial risk of serious harm, inmate plaintiffs should proffer a "feasible, readily implemented" alternative method of execution.³⁴⁹ Although there remains disagreement as to whether *Baze* in fact does require such a proffer,³⁵⁰ enough lower courts have read *Baze* to do so that the safe route would be to assume that it does.³⁵¹ Of course, there is a perversity in requiring plaintiffs to propose an alternative to a procedure about which they have no detailed information. That said, in many instances, the inmate knows enough to make a reasonable proffer. For example, if the plaintiff knows the state plans to use compounded pentobarbital, he could proffer that the state's drug be subjected to neutral chemical testing to check for flaws.³⁵² In that case, a chemical test would either vindicate the state or raise serious concerns about the drug's safety, thereby forcing the state to find a different drug that satisfied the chemical test.³⁵³

Similarly, if the plaintiff knows that the state plans to use the three-drug protocol, he could proffer either that the state switch to a one-drug method using safe drugs verified by neutral chemical testing, or, alternatively, that the state take proper precautions to ensure that the inmate is fully anesthetized before the injection of the second and third drugs. Of course, some lawyers will be loath to suggest methods of execution that may be used to kill their clients. The realities of contemporary lethal injection litigation, however, make it very

³⁴⁶ See *supra* notes 117–121 and accompanying text.

³⁴⁷ See *supra* notes 50–65, 123–133 and accompanying text.

³⁴⁸ See *supra* notes 63–64, 126–133, 153–160; *infra* notes 464–469 and accompanying text.

³⁴⁹ *Baze*, 553 U.S. at 52.

³⁵⁰ See, e.g., *In re Lombardi*, 741 F.3d at 899 (Bye, J., dissenting); *supra* notes 78–81 and accompanying text.

³⁵¹ See *supra* notes 78–81 and accompanying text.

³⁵² See *infra* notes 373–384 and accompanying text.

³⁵³ In this instance, the state could not reasonably assert that the proffered alternative was not sufficiently feasible. The state easily could return to the compounding pharmacy supplying the initial batch of drugs and explain that it needed unflawed compounded pentobarbital. Alternatively, the state could procure the proper drugs from a different pharmacy.

risky to decline to do so.³⁵⁴ Given that some courts link the right to information to the Eighth Amendment claim,³⁵⁵ failure to allege the Eighth Amendment violation in accordance with this reading of *Baze* could undermine the connected right to disclosure and short-circuit the litigation before it gets going.

C. The States' Interests

This Section examines the states' ostensible interests in lethal injection secrecy. It concludes that states often overstate these interests and, even more importantly, that courts can amply protect these interests with carefully crafted procedures that grant the inmate access to important information without threatening the states' core concerns. These arguments are relevant both to the third *Mathews* factor discussed above,³⁵⁶ and also to the more general, related issue of whether the states' interests sufficiently justify their refusal to share important details about their execution procedures.

1. Protecting Execution Team Anonymity

One frequent state concern in these cases is that disclosure of information pertaining to an execution procedure will publicize the identities of execution team members. Execution teams may include doctors, nurses, paramedics, phlebotomists, as well as correctional officials and prison guards participating during the execution. Given recent attention to drug suppliers, this concern extends also to the pharmacists or providers who compound or supply drugs for the state.

States' interest in the anonymity of their execution teams is understandable, especially given that members of the execution team or providing pharmacies can be subject to harassment.³⁵⁷ Nevertheless, courts can and have pro-

³⁵⁴ See Ty Alper, *The Truth About Physician Participation in Lethal Injection Executions*, 88 N.C. L. REV. 11, 21 (2009) ("[L]awyers for death row inmates challenging states' lethal injection procedures have generally argued that there are humane ways to execute prisoners, and they have routinely presented expert testimony to support this position.").

³⁵⁵ See *supra* notes 330–334 and accompanying text.

³⁵⁶ See *supra* notes 271–290 and accompanying text.

³⁵⁷ See Brandi Grissom, *TDCJ Refuses to Return Execution Drugs to Pharmacist*, TEX. TRIB., Oct. 7, 2013, <https://www.texastribune.org/2013/10/07/tdcj-refuses-return-execution-drugs-pharmacist/>, archived at <http://perma.cc/8QB7-XWGD> (describing hate mail compounding pharmacy received after it became public that it had provided drugs to Texas for use in executions); Ed Pilkington, *Texas Accuses Anti-Death Penalty Charity Reprive of Fomenting Violence*, GUARDIAN (U.K.), Mar. 28, 2012, <http://www.theguardian.com/world/2012/mar/28/death-penalty-texas-reprive>, archived at <http://perma.cc/X9TL-V5TC> (noting Texas's accusations of "intimidation and harassment" of manufacturers' whose drugs were used in lethal injection); Gary Grado, *State Secret: Arizona Tries to Conceal Identity of Firm That Makes Chemical for Lethal Injections*, ARIZ. CAPITAL TIMES, Oct. 14, 2013, <http://azcapitoltimes.com/news/2013/10/14/state-secret-arizona-tries-to-conceal-identity-of-firm-that-makes-chemical-for-lethal-injections/#ixzz3DtYNcw7>, archived at <http://perma.cc/Q8DP-4Y3E> (discussing compounding

tected these interests without denying inmates their Eighth Amendment due process rights. For example, courts can order that states disclose the details of their execution procedures while simultaneously permitting them to redact sensitive information, such as the names of the execution team members.³⁵⁸ The court also can require that sensitive filings be made *in camera* or under seal without redaction.³⁵⁹ Alternatively, it can issue a protective order specifying the terms of disclosure so as to share information with the litigants but protect against the public dissemination of sensitive information.³⁶⁰

In fashioning these discovery orders to protect the anonymity of execution team members and drug providers, courts must not deny inmates important information necessary to assess the constitutionality of the procedure. For example, while courts should protect the identities of execution team members, they should permit disclosure of the specific qualifications and training of these members, so inmates can assess whether they are capable of competently fulfilling the tasks assigned to them.³⁶¹ Though states typically argue that any discovery would necessarily publicize the identities of all execution team members, in reality courts are perfectly capable of striking sensible balances.³⁶² Discovery, in short, need not be an all-or-nothing proposition.

Courts have experience in a variety of settings striking this kind of balance, protecting the government's interests while simultaneously granting the private litigants the materials they need.³⁶³ Indeed, some judges in lethal injection cases have already made use of these kinds of procedural devices. For example, in 2006, a federal district court permitted an anonymous deposition of Missouri's execution team leader, who sat behind a screen and did not share

pharmacies receiving threats and hate mail). *But see* Ellyde Roko, *Executioner Identities: Toward Recognizing a Right to Know Who Is Hiding Beneath the Hood*, 75 *FORDHAM L. REV.* 2791, 2823–29 (2007) (arguing that the public's interest in knowing the executioner's identity outweighs the reasons for concealing identity).

³⁵⁸ See FED. R. CIV. P. 5.2(e) (giving the court discretion to require redaction of information in court filings).

³⁵⁹ See FED. R. CIV. P. 5.2(d) (“The court may order that a filing be made under seal without redaction.”).

³⁶⁰ See FED. R. CIV. P. 26(c) (“[T]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”).

³⁶¹ See, e.g., *Morales v. Hickman*, 415 F. Supp. 2d 1037, 1048 (N.D. Cal. 2006), *aff'd*, 438 F.3d 926 (9th Cir. 2006) (conditionally denying motion for preliminary injunction, indicating that state may share the qualifications of execution team members while redacting their “personal identifiers, except that the redacted information shall be provided to the Court for *in camera* review”).

³⁶² See *Berger*, *supra* note 22, at 304.

³⁶³ See, e.g., Classified Information Procedures Act (CIPA), 18 U.S.C. §§ 1–16 (1980); Afsheen John Radsan, *Remodeling the Classified Information Procedures Act (CIPA)*, 32 *CARDOZO L. REV.* 437, 438–39 (2010) (noting cases in which courts relied on “CIPA-style procedures to balance the values of secrecy and transparency”).

his name.³⁶⁴ While imperfect, such a mechanism permits the inmate's lawyers to assess an execution team members' competence while preserving his anonymity.³⁶⁵ Courts have similarly permitted states to submit sensitive lethal injection material for *in camera* review or fashioned protective orders prohibiting the plaintiff from publicly disseminating sensitive information.³⁶⁶ The states' argument that any discovery will necessarily compromise the anonymity of their execution teams is, in short, a canard.³⁶⁷

2. Ensuring the Enduring Viability of Lethal Injection

A related state concern is that continued judicial proceedings undermine the death penalty altogether. Anti-death penalty sentiment, both domestic and international, has limited states' access to drugs used in lethal injections.³⁶⁸ More specifically, pharmaceutical companies, hoping to avoid public relations problems, increasingly decide that they do not want their names associated with capital punishment and therefore do not want their products used in executions. If states wish to continue lethal injection, they need to get drugs from other sources, such as compounding pharmacies. As the Apothecary Shoppe's hasty settlement in *Taylor* indicates, however, some compounding pharmacies also may not want the bad publicity associated with executions.³⁶⁹ Were all potential drug suppliers to respond this way, states may be forced to abandon lethal injection altogether. States intent on continuing executions, then, believe

³⁶⁴ See, e.g., Doe Deposition, *supra* note 62, at 1 (noting for the record that the deponent was behind a screen).

³⁶⁵ An enterprising reporter eventually revealed this doctor's identity, but that might have happened anyway and, in any event, is not a sufficient justification for rejecting a legitimate constitutional claim. See Jeremy Kohler, *Behind the Mask of the Mo. Execution Doctor*, ST. LOUIS POST-DISPATCH, July 29, 2006, at A1.

³⁶⁶ See *Moeller v. Weber*, No. 04-4200, 2008 WL 1957842, at *4 (D. S.D. May 2, 2008) (allowing State to submit sensitive materials for in camera review); *Sells & Llanas v. Livingston*, No. H-14-832 (S.D. Tex. Apr. 2, 2014) (order granting preliminary injunction) (requiring state to disclose under seal all information regarding procurement of drugs); *Evans v. Saar*, No. 06-149, (D. Md. Jan. 27, 2006) (order granting protective order) (requiring disclosure of certain state lethal injection records, provided that plaintiff's counsel not distribute such records to any third party and that plaintiff's counsel return all such records to State at conclusion of litigation); *Taylor v. Crawford*, No. 05-4173, 2006 WL 1779035, at *7 (W.D. Mo. Oct. 31, 2005) (order granting protective order); *Morales*, 415 F. Supp. 2d at 1048; *Berger*, *supra* note 22, at 304.

³⁶⁷ Inmates, for their part, should not seek to learn the identities of execution team members. Such requests will likely accomplish little more than alienating the judge.

³⁶⁸ See *Gibson & Lain*, *supra* note 89, at 28–38.

³⁶⁹ The Apothecary Shoppe did not admit it had ever planned to supply drugs for executions, though it also did not deny it. See Defendant's Brief in Support of Its Motion to Seal Documents, at 3, *Taylor v. Apothecary Shoppe*, No. 14-CV-063-TCK-TLW (N.D. Ok. Feb. 18, 2014).

they have a strong interest in keeping secret their compounding pharmacies, lest lawsuits and bad publicity scare them away, too.³⁷⁰

Once again, the states' argument underestimates courts' ability to strike a sensible balance. As an initial matter, some death-penalty states are far less protective of medical providers' anonymity in the abortion context, opening up abortion providers' records to public inspection.³⁷¹ Regardless of one's views about abortion or capital punishment, this difference demonstrates that states do not consistently prioritize the anonymity of doctors and other people participating in legal but highly controversial medical (or quasi-medical) procedures.³⁷²

Even taking for granted the validity of states' concerns, however, they are overstated. Just as courts can fashion procedures to protect executioner identity, so too can they order impartial tests that would verify the chemical properties of the drugs without disclosing the identity of the supplying pharmacies.³⁷³ States and inmates could even agree to such tests themselves without court order. If impartial, properly credentialed testers using scientifically validated testing methods determined that each of the state's drugs was what it was supposed to be (for example, 100% pentobarbital) and in its finished form was sterile, uncontaminated, and otherwise unflawed, the execution could proceed as scheduled (assuming no other serious problems with the procedure).³⁷⁴ If, however, the ingredients or drugs were deemed tainted, sub-potent, super-potent, or otherwise flawed, the state could not proceed until it found safe alternatives.

³⁷⁰ See Editorial Board, *Abbott Does an About-Face on Open Records*, AUSTIN AMERICAN-STATESMAN, June 7, 2014, <http://www.statesman.com/news/news/opinion/abbotts-commitment-to-open-government-questioned/ngF6Z/>, archived at <http://perma.cc/35R6-AJT6> (noting that a Texas compounding pharmacy stopped supplying the State with drugs for lethal injection after its identity was disclosed and it received "constant inquiries from the press" and "hate mail").

³⁷¹ See, e.g., TEX. HEALTH & SAFETY CODE § 245.005(f) (1989) ("Information regarding the licensing status of an abortion facility is an open record."); *id.* § 139.6 (making records pertaining to inspection of abortion facilities open to public).

³⁷² See William Saletan, *Is Texas Covering Up After-Birth Abortions?*, SLATE (Mar. 21, 2014) http://www.slate.com/blogs/saletan/2014/03/21/abortion_and_the_death_penalty_why_does_texas_protect_pharmacies_that_sell.html, archived at <http://perma.cc/BM9N-UNXK> (noting Texas's inconsistent approach to public disclosure in abortion and death penalty settings).

³⁷³ Some companies provide laboratory chemical analysis for the testing of pharmaceuticals. See, e.g., *Analytical Chemistry and Materials Characterization Services*, TRICLINIC LABS, <http://tricliniclabs.com/directory/solid-state-development-services/physical-and-analytical-chemistry/analytical-chemistry-and-pharmaceutical-materials-characterization-laboratory-services.html?gclid=CNud59SYgb0CFZLm7AodSU0A9w>, archived at <http://perma.cc/F3N2-74VM> (last visited Oct. 4, 2014); *Excellence in Science: FDA & DEA Registered Analytical Laboratory*, FLORA RESEARCH LABORATORIES, <http://www.floraresearch.com/first.html>, archived at <http://perma.cc/4DX9-HXUG> (last visited Oct. 16, 2014).

³⁷⁴ See Johnson & Jones, *supra* note 113, at 14 (arguing that compounding pharmacies should be subject to validating testing procedures; Sellers Interview, *supra* note 107).

As with the procedural mechanisms already discussed, this approach would provide the court with crucial information about a lethal injection procedure's safety without compromising the identity of the providing pharmacy.³⁷⁵ Admittedly, chemical drug testing cannot guarantee a painless execution, especially because states have not conducted foundational risk assessments closely examining the safety and efficacy of drugs in various doses and in various combinations for executions.³⁷⁶ Nevertheless, neutral chemical testing can identify chemical flaws or impurities that make the drugs act in unpredictable ways.³⁷⁷ Thus, this approach would reduce the unpredictability of the states' drugs without obstructing executions using drugs that passed muster.

From this perspective, inmates requesting the identity of providing pharmacies do so at their own peril.³⁷⁸ Such requests have never been successful, and they may even bias a judge against the inmate's case. Instead, the inmate should propose that the court, with the assistance of the parties, identify a neutral, reputable drug tester to verify the chemical purity of the drugs. To ensure reliability, such testing should involve two separate steps. First, the tester should study the active pharmaceutical ingredients (APIs) that the compounding pharmacy plans to mix to ensure that the active ingredients are what they claim to be and are not contaminated, degraded, or otherwise flawed.³⁷⁹ Second, after the active ingredients have been mixed into the final product, the tester should examine the finished dosage form to test for sub-potency, super-potency, and extrinsic contamination.³⁸⁰

³⁷⁵ See Chollet & Jozwiakowski, *supra* note 105, at 8 (arguing that the "variability in quality" of a compounded injectable drug is essentially invisible to patients and health care practitioners); cf. Turner v. Safley, 482 U.S. 78, 89–90 (1987) (asking whether there exists "a ready alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests . . .").

³⁷⁶ See Denno, *supra* note 17, at 1363 (discussing the lack of testing on the suitability of pentobarbital for execution purposes); Sellers Email, *supra* note 105.

³⁷⁷ See J.H. Perrin, *Comments on Drugs Difficult to Compound and the Quality of Chemicals to Be Used in Compounding*, 25 DRUG DEV. & INDUSTRIAL PHARMACY 553, archived at <http://perma.cc/U36Q-4KPY?type=pdf> (explaining that compounded intravenous compounded drugs should never be released without testing for sterility, pyrogens, and chemical analyses); Sellers Interview, *supra* note 107.

³⁷⁸ Cf. Fan, *supra* note 150, at 25 (arguing that states ought not be forced to disclose the identity of drug suppliers for executions).

³⁷⁹ See Jiben Roy, *Pharmaceutical Impurities: A Mini-Review*, AAPS PHARMSCITECH 1 (2002), <http://www.aapspharmscitech.org>, archived at <http://perma.cc/ZE63-YVXM> (arguing that impurities in APIs "even in small amounts may influence the efficacy and safety of the pharmaceutical products"); Sellers Interview, *supra* note 107. The "certificate of analysis" accompanying many ingredients used by compounding pharmacies includes a disclaimer that the packager does not vouch for its contents and, in the words of one expert, is "meaningless." See Sellers Interview, *supra* note 107.

³⁸⁰ See Chollet & Jozwiakowski, *supra* note 105, at 2 (describing FDA test of compounded drugs indicating that 33% failed testing, mainly due to sub-potency or super-potency issues ranging from 67.5–268.4% of the label claim); Sellers Interview, *supra* note 107; Sellers Email, *supra* note 105.

Although two-step testing may seem excessive, either step on its own is inadequate.³⁸¹ Testing only the ingredients, quite obviously, cannot detect flaws in the final product.³⁸² Likewise, testing only the finished dosage form cannot accurately determine whether some of a drug's ingredients are compromised in a way that would cause pain or prevent the drug from working properly.³⁸³ For example, some ingredients may contain bacteria, fungi, or endotoxins that can cause immediate reactions and pain, but may be undetected by tests of the finished product.³⁸⁴ By requiring these two steps, courts can properly determine if the state's drugs have the chemical properties of the drug or drugs the state purports to use. This approach would help protect the inmate's Eighth Amendment rights without jeopardizing capital punishment in a broader sense.

Of course, other compounding pharmacies might eventually follow the lead of the Apothecary Shoppe and larger pharmaceutical corporations and refuse to supply drugs for use in executions.³⁸⁵ If, however, courts adopted the procedures suggested here, these developments, if they occurred, could not fairly be blamed on Eighth Amendment litigation.³⁸⁶ Drug manufacturers may be increasingly reluctant to allow their products to be used in executions,³⁸⁷ but that phenomenon is distinct from constitutional lawsuits. Death penalty opponents will continue to try to dissuade pharmacies and other companies from assisting states with executions, regardless of the legal arguments inmates ad-

³⁸¹ See Johnson & Jones, *supra* note 113, at 14 (explaining that no single test can determine whether an injectable drug is sterile and pyrogen-free so one must use a "process that must be reviewed, tested, validated, and documented"); Roy, *supra* note 379, at 2 (noting that impurities in medicines can result from either impurities in the ingredients or impurities created during the formulation of medicines); Sellers Interview, *supra* note 107.

³⁸² See Roy, *supra* note 379, at 2; Sellers Interview, *supra* note 107.

³⁸³ See Chollet & Jozwiakowski, *supra* note 105, at 2 (explaining that to determine efficacy of an injectable drug, "the potency and purity" of the APIs also must be examined); Sellers Interview, *supra* note 107.

³⁸⁴ See U.S. FOOD & DRUG ADMIN., BACTERIAL ENDOTOXINS/PYROGENS, <http://www.fda.gov/ICECI/Inspections/InspectionGuides/InspectionTechnicalGuides/ucm072918.htm>, archived at <http://perma.cc/VD8R-NSWP> (explaining that pyrogens of individual components of a drug may be masked by physio-chemical activity of the final combined product); Sellers Interview, *supra* note 107.

³⁸⁵ See David Green, *Compounding Pharmacies Called on to Make Execution Drugs*, NAT'L PUB. RADIO (Feb. 17, 2014), <http://www.npr.org/2014/02/17/278389208/compounding-pharmacies-called-on-to-make-execution-drugs>, archived at <http://perma.cc/KDN9-S4Z7> (discussing compounding pharmacies and executions).

³⁸⁶ Cf. Fan, *supra* note 150, at 23 (arguing that efforts to push out drug suppliers has made executions more dangerous); Boer Deng & Dahlia Lithwick, *In the Push to Abolish Capital Punishment, Opponents of the Death Penalty Have Made It Less Safe*, SLATE (May 9, 2014) http://www.slate.com/articles/news_and_politics/jurisprudence/2014/05/death_penalty_in_america_how_the_push_to_abolish_capital_punishment_has.html, archived at <http://perma.cc/7XFE-LKGB> (same).

³⁸⁷ See Gibson & Lain, *supra* note 89, at 12–14; *supra* notes 89–94 and accompanying text.

vance in their lawsuits.³⁸⁸ Moreover, given the fact that there are about 56,000 compounding pharmacies in the United States today,³⁸⁹ it is unlikely that they all would decide to stop supplying drugs for executions in the absence of legislation forbidding the practice.³⁹⁰

But even if compounding pharmacies all stopped supplying drugs for executions, states could still turn to other methods of executions. Indeed, some death penalty experts contend that other methods carry fewer risks than lethal injection.³⁹¹ Some states are themselves beginning to explore alternatives to lethal injection. Tennessee, for instance, recently adopted a new law allowing the State to execute by electrocution if lethal drugs are unavailable or if lethal injection is deemed unconstitutional.³⁹² Similarly, Oklahoma legislators are planning to study the possibility of using nitrogen gas for executions, and still other states are examining reviving the firing squad.³⁹³ Concerns about capital punishment's survival, therefore, should not deter courts from abdicating their responsibility to determine whether execution procedures before them are constitutional.

³⁸⁸ See Pilkington, *supra* note 357 (quoting view that "pharmaceutical manufacturers have been objecting to the use of medicines in executions since the lethal injection was invented" and that anti-death penalty activists "didn't create these ethical scruples").

³⁸⁹ See Denno, *supra* note 17, at 1367.

³⁹⁰ See *id.* at 1375–76 (discussing recent legislation and proposed legislation that may interfere with compounding pharmacies supplying lethal drugs to states). It is also possible that the International Academy of Compounding Pharmacists (IACP) could amend its Code of Ethics or Bylaws to try to eradicate the practice. See IACP BYLAWS, art. IX., § 1 (2014), available at http://c.ymcdn.com/sites/www.iacprx.org/resource/resmgr/Docs/IACP_Bylaws_Revised_01312014.pdf, archived at <http://perma.cc/7GV2-A859> (last visited Oct. 4, 2014); IACP Code of Ethics, INTERNATIONAL ACADEMY OF COMPOUNDING PHARMACISTS, <http://iacp.site-ym.com/?page=6>, archived at <http://perma.cc/BG4N-95YA> (last visited Oct. 4, 2014).

³⁹¹ See Assoc. Press, *Experts Argue Firing Squad Is a Humane Execution*, KSL.COM, (June 16, 2010) <http://www.ksl.com/?nid=148&sid=11194774#S6LrA2I7ouH5JsFW.99>, archived at <http://perma.cc/T9PS-9EWR> (quoting death penalty experts suggesting that firing squad may carry fewer risks than lethal injection); Tom McNichol, *Death by Nitrogen*, SLATE (May 22, 2014) http://www.slate.com/articles/news_and_politics/jurisprudence/2014/05/death_by_nitrogen_gas_will_the_new_method_of_execution_save_the_death_penalty.html?wpisrc=obinsite, archived at <http://perma.cc/9PKA-HB6M> (suggesting that nitrogen asphyxiation might provide a painless death and may someday replace lethal injection).

³⁹² Mark Berman, *Tennessee Has Long Had the Electric Chair, But Now It's Going to Be Available for More Executions*, WASH. POST, May 23, 2014, <http://www.washingtonpost.com/news/post-nation/wp/2014/05/23/tennessee-has-long-had-the-electric-chair-but-now-its-going-to-be-available-for-more-executions/>, archived at <http://perma.cc/YGN9-ZJDE>.

³⁹³ See Mark Berman, *The Recent History of States Contemplating Firing Squads and Other Execution Methods*, WASH. POST, May 22, 2014, <http://www.washingtonpost.com/news/post-nation/wp/2014/05/22/the-recent-history-of-states-contemplating-firing-squads-and-other-execution-methods/>, archived at <http://perma.cc/MZT4-UFGW>; Assoc. Press, *Legislators to Explore Gas as Execution Option*, ENIDNEWS.COM (Sept. 16, 2014), http://www.enidnews.com/news/article_dd89d606-3dac-11e4-869b-537f0f227fb9.html, archived at <http://perma.cc/9ZWC-V62M>.

3. Resisting Delay

States also often object to stays of execution that inmates sometimes request to study and challenge a state's lethal injection procedure. States typically argue that temporary injunctions halting an imminent execution thwart the administration of justice, incur additional litigation expenses, and prolong the agony of victims' families.³⁹⁴ A stay of execution, states emphasize, is usually justified only by "extraordinary" circumstances.³⁹⁵ Accordingly, courts frequently reject the inmate's request for a stay to examine execution procedures and assume that lethal injection litigation's sole or primary goal is to prolong the inmate's life, especially in the case of "eleventh hour" litigation.³⁹⁶

Because the legal burden to obtain a stay of execution is high, the states' arguments, in theory, seem compelling.³⁹⁷ In practice, however, the states' behavior often precipitates the need for the stay, thus tilting the equities back in the inmate's favor.³⁹⁸ For example, states often change their procedure days or weeks before a scheduled execution.³⁹⁹ In such instances, inmates who have diligently litigated in advance of the scheduled execution find themselves needing a last-minute stay to examine the new procedure.⁴⁰⁰ Admittedly, drug shortages may force states to change their plans as an execution approaches, but the mere fact that states have difficulty finding the drugs they plan to use

³⁹⁴ See *Sepulvado*, 729 F.3d at 420; *Zink* Opposition Suggestions, *supra* note 7, at 4.

³⁹⁵ See *Sepulvado*, 729 F.3d at 417; *Adams v. Thaler*, 659 F.3d 312, 317–18 (5th Cir. 2012); *Cooper v. Woodford*, 358 F.3d 1117, 1128 (9th Cir. 2004) (Tallman, J., dissenting) (disagreeing with en banc stay order, arguing that a stay of execution is inappropriate because no "extraordinary" circumstances existed).

³⁹⁶ See, e.g., *Ryan v. Gonzales*, 133 S. Ct. 696, 709 (2013) ("[C]apital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death" (quoting *Rhines v. Weber*, 544 U.S. 269, 277–78 (2005))); *Knight v. Florida*, 528 U.S. 990, 991 (1999) (Thomas, J., concurring) (objecting to the court's "Byzantine death penalty jurisprudence" that "arm[s] capital defendants with an arsenal of 'constitutional' claims with which they may delay their executions"); *Berry v. Epps*, 506 F.3d 402, 404 (5th Cir. 2007) ("Our precedent requires the dismissal of 'eleventh hour' dilatory claims"); *Grayson v. Allen*, 491 F.3d 1318, 1326 (11th Cir. 2007) ("If Grayson truly had intended to challenge Alabama's lethal injection protocol, he would not have deliberately waited to file suit until a decision on the merits would be impossible without entry of a stay or an expedited litigation schedule.").

³⁹⁷ See, e.g., *Barefoot*, 463 U.S. at 895.

³⁹⁸ See, e.g., *Landrigan v. Brewer*, No. 10–02246, 2010 WL 4269559, at *9 (D. Ariz. Oct. 25, 2010) ("Defendants have never adequately explained their rationale for withholding all evidence regarding the drug, and Defendants have now created a situation where a seemingly simple claim that could have been resolved well in advance of the execution must be resolved in five days—and now only eighteen hours due to further protraction created only be [sic] Defendants—without the benefit of Plaintiff having the opportunity to present fact-based arguments."), *aff'd*, 625 F.3d 1144 (9th Cir. 2010), *rev'd*, 131 S. Ct. 445 (U.S. Oct. 26, 2010).

³⁹⁹ See *supra* notes 1–12, 196–198, 205, 289 and accompanying text.

⁴⁰⁰ See *Bowersox*, No. 14–1403, slip op. at 2 (Bye, J., dissenting); *Beatty*, 649 F.3d at 1077 (Reinhardt, J., dissenting).

does not justify the denial of inmates' Eighth Amendment rights.⁴⁰¹ If anything, given that an excruciating execution is irreparable, the equities at this point should favor the plaintiff seeking the stay.⁴⁰²

States also often obstruct inmates' dutiful attempts to learn about an execution procedure for months or even years before an execution date. Courts are sometimes complicit in these efforts, dismissing early challenges to execution procedures as unripe and later challenges as barred by the statute of limitations.⁴⁰³ States, then, try to trap inmates in a catch-22, by arguing that courts should treat early challenges as unripe and later ones as dilatory.⁴⁰⁴ In such instances, where the state itself has obstructed the inmate's access to the execution procedure, the inmate's constitutional interests should trump the state's interests in the timely administration of justice.⁴⁰⁵ Indeed, if anything, the recognition of a due process right to information would obviate the need for stays of execution, because states would be forced to disclose execution protocols earlier, thereby permitting courts to hear Eighth Amendment challenges without having to worry about interfering with an imminent execution.

Of course, in other instances, where the inmate has been truly dilatory in challenging the state's unaltered procedure, a court may be justified in denying a stay. It is worth noting, however, that in some cases the disclosure of an execution protocol will not delay an execution at all. For example, in Colorado, the American Civil Liberties Union brought suit against the Department of

⁴⁰¹ Nor can the inmates be fairly blamed for the drug shortages. As noted above, courts routinely deny inmates' efforts to learn the source of the drugs. See *supra* notes 175–205 and accompanying text. Accordingly, even if inmates wished to pressure pharmacies to stop providing lethal drugs, they lack the ability to do so. Anti-death penalty activists, for their part, may try to so pressure pharmacies, but they are independent actors, whom the inmates cannot control. See Fan, *supra* note 150, at 9–10 (describing anti-death penalty activists' attempts to pressure pharmacies).

⁴⁰² See Ty Alper, *Blind Dates: When Should the Statute of Limitations Begin to Run on a Method-of-Execution Challenge?*, 60 DUKE L.J. 865, 897 (2011) (arguing that if the lethal injection plaintiff could not have filed his action sooner to challenge the state's current procedure, then the court should grant a stay of execution when necessary to permit the litigation to proceed).

⁴⁰³ See, e.g., *Wellons v. Comm'r, Ga. Dep't of Corr.*, 754 F.3d 1260, 1264 (11th Cir. 2014) (determining that statute of limitations began to run thirteen years earlier when state abandoned electrocution and has therefore expired); *Worthington v. State*, 166 S.W.3d 566, 583 n.3 (Mo. 2005) (holding that, because "it is unknown what method, if any, of lethal injection may be utilized by the State . . . [when] execution date and method are set, it [was] premature . . . to consider whether a particular method of lethal injection violates the Eighth Amendment"); *Gallo v. State*, 239 S.W.3d 757, 780 (Tex. Crim. App. 2007) (holding that a lethal injection challenge was not "ripe," because there was no execution date and the "method in which lethal injection is currently administered is not determinative of the way it will be administered at the moment of appellant's execution"); Alper, *supra* note 402, at 897.

⁴⁰⁴ See Berger, *supra* note 22, at 294.

⁴⁰⁵ See *Hill v. Owens*, No. 2013-cv-233771, slip op. at 4 (Ga. Super. Ct. July 18, 2013) (granting preliminary injunction and finding that litigation was not a dilatory tactic because plaintiff raised a "legitimate and substantive" question about a new procedure that has not been reviewed by any court).

Corrections, challenging its practice of keeping its execution protocol secret as a violation of the State's Administrative Procedure Act.⁴⁰⁶ The court permitted partial access to the protocol.⁴⁰⁷ Disclosure in that case did not necessitate any stays of execution; the case was about access to the procedure generally and not the constitutionality of a procedure intended for a particular inmate. Additionally, were courts to permit an inmate's lethal-injection challenge before an execution date has been set, they would obviate the need to stay an execution to permit the litigation to continue. Thus, while the states' interest in resisting delay may obstruct the inmate's right to know in some cases, that interest will often be either irrelevant (because no delay would occur) or unpersuasive (because the state itself has created the need for delay).

4. Resisting Frivolous Litigation

States assert a final, related argument that frivolous litigation burdens states and courts, and judges should therefore protect state governments and the judiciary against such hassle and expense.⁴⁰⁸ As the Supreme Court indicated in *Baze*, execution procedures in the United States have seemed to become safer over time.⁴⁰⁹ Cognizant of this evolution, states may honestly believe that executions today are safe and that Eighth Amendment challenges to lethal injection therefore lack merit.⁴¹⁰

Many judges apparently share this initial reaction, especially when they have not closely examined the states' lethal injection procedures themselves.⁴¹¹ These judges may also fear that evidence of problematic execution procedures will result in a time-consuming investigation of complicated medical details beyond their expertise.⁴¹² Judges may not deliberately turn a blind eye to

⁴⁰⁶ See *ACLU v. Colo. Dep't of Corr.*, No. 13-CV-32325, slip op. at 6 (Colo. Dist. Ct. Aug. 1, 2013), available at <http://aclu-co.org/case/aclu-v-colorado-department-of-corrections>, archived at <http://perma.cc/SKT2-R4F2>.

⁴⁰⁷ See *id.* at 9.

⁴⁰⁸ See, e.g., Mike Dorf, *What's a Technicality in the Death Penalty Context*, DORF ON LAW (Jan. 30, 2014), <http://www.dorfonlaw.org/2014/01/whats-technicality-in-death-penalty.html>, archived at <http://perma.cc/SFB6-LY8F> (noting that courts tend to be skeptical of what they perceive to be "opportunistic" challenges to the death penalty).

⁴⁰⁹ See *Baze*, 553 U.S. at 62.

⁴¹⁰ Cf. Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 28, 28 (2007) (explaining that judges often base their decisions on initial intuitions rather than careful, reasoned reflection).

⁴¹¹ See Jeremy Fogel, *In the Eye of the Storm: A Judge's Experience in Lethal-Injection Litigation*, 35 *FORD. URB. L.J.* 735, 736, 739–43 (2008) (recounting that judge was initially "extremely skeptical" about challenge to California lethal injection procedure but found several serious problems after carefully studying the procedure).

⁴¹² See *Baze*, 553 U.S. at 51 (noting that permitting an Eighth Amendment violation simply because the plaintiff has proffered "a slightly or marginally safer alternative . . . would embroil the courts in ongoing scientific controversies beyond their expertise").

claims they believe to be meritorious, but when faced with a difficult question, many judges will err on the side of deferring to the prison to avoid complicated litigation intruding in a sensitive state function.⁴¹³

States sometimes reframe these general concerns in legal terms that emphasize that due process is not unmeasured.⁴¹⁴ Accordingly, states argue that even if inmates in these cases have a due process interest, the degree of process required decreases where the underlying constitutional claim lacks significant merit.⁴¹⁵ This argument incorrectly assumes the invalidity of the inmate's Eighth Amendment claim. The series of recent botched executions amply demonstrate that, far from being frivolous, inmates' lethal injection challenges identify very serious risks inherent in lethal injection, especially in states with a history of problems.⁴¹⁶ As explained above, these problems have not been limited to one method of lethal injection but rather have occurred in procedures using one, two, and three drugs.⁴¹⁷ Moreover, even states without a record of visible botches still often use procedures riddled with dangers, including unpredictable drugs and a lack of expertise, transparency, oversight, and contingency plans.⁴¹⁸

These various problems belie the notion that states can be trusted to fashion safe procedures.⁴¹⁹ Were a state to demonstrate that it had crafted a safe, problem-free execution procedure, perhaps it would have legitimate grounds to deem the inmate's claims frivolous. In reality, though, most states cannot hon-

⁴¹³ See, e.g., *Turner v. Safley*, 482 U.S. 78, 89 (1987) (noting that "when accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials"); *Rhodes v. Chapman*, 452 U.S. 337, 362 (1981) (Brennan, J., concurring) ("[C]ourts have been especially deferential to prison authorities 'in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.'" (quoting *Bell v. Wolfish*, 441 U.S. 520, 547 (1979))); *Procunier v. Martinez*, 416 U.S. 396, 404–05 (1974) ("[F]ederal courts have adopted a broad hands-off attitude toward problems of prison administration."); *Berger*, *supra* note 40, at 2045–47, 209–92 (discussing *Turner v. Safley*'s inconsistent approach to deference); see also Eric Berger, *Deference Determinations and Stealth Constitutional Decision Making*, 98 IOWA L. REV. 465, 485–87 (2013) (discussing deference to prisons); Edward C. Dawson, *Adjusting the Presumption of Constitutionality Based on Margin of Statutory Passage*, 16 U. PA. J. CONST. L. 97, 107 (2013) (discussing various judicial practices that allow courts to avoid addressing difficult constitutional questions).

⁴¹⁴ See *Carey v. Piphus*, 435 U.S. 247, 259, 266 (1978).

⁴¹⁵ Cf. *Brewer v. Landrigan*, 131 S. Ct. at 445 ("But speculation cannot substitute for evidence that the use of the drug is 'sure or very likely to cause serious illness and needless suffering.'" (quoting *Baze*, 553 U.S. at 50)); *Beatty*, 649 F.3d at 1074 (Tallman, Cir. J., concurring) (agreeing with the denial of rehearing).

⁴¹⁶ See *supra* notes 50–140 and accompanying text.

⁴¹⁷ See *supra* notes 139–140 and accompanying text.

⁴¹⁸ See *Berger*, *supra* note 142, at 53–59.

⁴¹⁹ See *Denno*, *supra* note 17, at 1339–45; *Berger*, *supra* note 22, at 263–73, 301–14; *Berger*, *supra* note 40, at 2082–84.

estly celebrate such a record. Indeed, the long history of serious lethal-injection problems should demonstrate that courts hearing these cases should no longer afford states the benefit of the doubt.

D. The Due Process Remedy

Due process and Eighth Amendment principles together, then, should require states to share with inmates all the meaningful details of their execution procedures. This right to know should encompass the name of the drugs, neutral chemical testing of all the drugs—or the names of the drugs’ manufacturer or compounder⁴²⁰—the steps the state will use to prepare and inject the drugs, the qualifications of the person charged with inserting the catheter into the inmate’s veins, the qualifications of the person assessing the inmate’s anesthetic depth, the qualifications of the other execution team members, the architecture of the execution facility, the equipment used during the procedure, the execution team’s training measures, the State’s contingency plans if one or more steps of the execution do not proceed as planned, and other material information.⁴²¹ Each of these factors can meaningfully affect the chances that an inmate will feel serious pain during his execution.⁴²² A lethal injection procedure that appears safe on paper can become excruciating if, *inter alia*, the state’s drugs are not what they are supposed to be, or if the catheter is not inserted properly into the inmate’s vein, or if an inmate is incorrectly deemed unconscious, or if the drugs are mishandled by prison staff, or if another member of the execution team fails to do her job properly.⁴²³

Just as the right to know should encompass all the material details of a state’s lethal injection procedure, so too should it include information about meaningful changes to that procedure. Initial information about an execution procedure’s details is worthless if the state subsequently changes that procedure before the execution.⁴²⁴ While courts should not force states to relitigate the constitutionality of unaltered execution procedures already pronounced constitutional, they should require states to disclose all material changes to

⁴²⁰ It is very unlikely that a state would prefer to disclose the name of the drug compounder instead of the results of neutral chemical testing.

⁴²¹ As discussed above, where the state has a genuine interest in secrecy, courts can fashion procedures that protect sensitive information, such as the names of people associated with executions, while simultaneously granting the inmate access to all material that is pertinent to a lethal injection procedure’s safety. See *supra* notes 357–393 and accompanying text.

⁴²² See *infra* notes 457–485 and accompanying text.

⁴²³ See Berger, *supra* note 22, at 263–73 (discussing numerous problems that can and have arisen in states’ lethal injection procedures).

⁴²⁴ See Colin Chazen, Comment, *Beatty and the Beast: A Prisoner’s Due Process Right to Notice of Changes to Execution Protocols*, 53 B.C. L. REV. E. SUPP. 159, 165–67 (2012), http://bclawreview.org/e-suppl/2012/13_chazen.pdf, archived at <http://perma.cc/Y4H5-9W6P>.

their procedures so that inmates and judges can assess whether such changes heighten the risk of pain. As Judge Reinhardt argued in dissent:

Why bother to properly administer a protocol that a court has held is constitutionally sufficient on its face, when you can just discard that protocol and adopt a new one on the eve of the execution? This way, Arizona has ensured itself a way of using a protocol that a court can “never” look at it in any serious fashion, and it can “flout” the requirement for a constitutionally sufficient protocol “without fear of repercussion.”⁴²⁵

E. Counter-Arguments

Counter-arguments trying to undermine the due process right asserted here may have a surface appeal but are, on closer consideration, unpersuasive. First, states might argue that without the information requested, inmates do not have enough evidence of harm to satisfy the stringent pleading requirements erected by the U.S. Supreme Court’s decisions in *Bell Atlantic Corp. v. Twombly*⁴²⁶ and in *Ashcroft v. Iqbal*.⁴²⁷ Collectively, those cases appear to endorse “plausibility pleading,” which ostensibly imposes higher burdens on plaintiffs at the pleadings phase than had previously existed under the Federal Rules of Civil Procedure.⁴²⁸ Thus, the argument goes, without specific facts about a state’s lethal injection procedures, inmates do not know enough to bring an Eighth Amendment challenge that satisfies Rule 8’s demand for “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.”⁴²⁹

This argument misses the mark, because even without much information from the state, an inmate usually knows enough to plead a facially sufficient claim. For example, many states admit that they plan to use compounded drugs; they just withhold the name of the compounding pharmacy and the precise chemical properties of the drugs they use. Given dangers associated with compounded drugs and botched executions involving them, the plaintiff’s allegation that the state plans to use compounded pentobarbital satisfies even *Iqbal*’s heightened pleading requirements.⁴³⁰ Of course, further inquiry such as neutral chemical testing could vindicate the safety of the state’s procedure, but the dangers of compounded pentobarbital are well known and serious enough

⁴²⁵ *Beatty*, 649 F.3d at 1073 (Reinhardt, J., dissenting).

⁴²⁶ 550 U.S. 544, 544–45 (2007).

⁴²⁷ 556 U.S. 662, 678 (2009).

⁴²⁸ See Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1295 (2010).

⁴²⁹ *Iqbal*, 556 U.S. at 678.

⁴³⁰ See *id.*

that the state's admission to using them should alleviate *Twombly* and *Iqbal* concerns. Similarly, given the well-recognized dangers of the three-drug protocol, inmates have sufficient cause to fear that states using that method will make mistakes heightening the risk of agonizing pain.⁴³¹

Second, and relatedly, some federal appellate courts have rejected inmates' requests for information on the grounds that due process does not encompass a right to *discover* potential claims.⁴³² This argument misunderstands both the relevant precedent and the plaintiffs' contentions. For the proposition that due process does not include a right to discover claims, these courts cite *Lewis v. Casey*,⁴³³ in which the Supreme Court held that an inmate's due process right to access courts is not violated simply by establishing that "his prison's law library or legal assistance program is subpar in some theoretical sense."⁴³⁴ *Lewis*, however, emphasized that the inmate's right to access courts cannot be violated if he does not assert some actual injury—that is, unless the law library's deficiencies actually frustrated an inmate's substantive legal claim.⁴³⁵ The due process right to access courts, in other words, serves to safeguard other rights, and the *Lewis* plaintiffs at issue in this portion of the decision asserted no injury beyond the library's shortcomings.⁴³⁶ By contrast, as explained above, in lethal injection litigation, inmates assert a due process right to information to protect their substantive Eighth Amendment right.⁴³⁷

Even more to the point, these appellate courts' contention misperceives the nature of the plaintiffs' argument. Inmates do not seek information to *discover* potential claims. To the contrary, inmates challenging lethal injection procedures already assert non-frivolous Eighth Amendment claims resting upon genuine concerns about the safety of procedures that have gone awry before and could easily go awry again.⁴³⁸ When a lethal injection plaintiff invokes a due process right to information, he does so not to discover a new claim but to determine whether the details of his own state's execution procedure heighten

⁴³¹ See *supra* notes 48–140 and accompanying text.

⁴³² See, e.g., *Williams v. Hobbs*, 658 F.3d 842, 852 (8th Cir. 2011) (citing *Lewis v. Casey*, 518 U.S. 343, 351, 354 (1996)) ("[T]he prisoners argument is grounded in an inability to *discover* potential claims, which courts have held does not constitute a due process violation."); *Wellons*, 754 F.3d at 1267.

⁴³³ 518 U.S. at 343.

⁴³⁴ *Id.* at 351.

⁴³⁵ See *id.* ("[The inmate] might show, for example, that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison's legal assistance facilities, he could not have known. Or that he had suffered arguably actionable harm that he wished to bring before the courts, but was so stymied by inadequacies of the law library that he was unable even to file a complaint.").

⁴³⁶ See *id.* at 352–54.

⁴³⁷ See *supra* notes 240–291, 329–355 and accompanying text.

⁴³⁸ See *supra* notes 48–140 and accompanying text.

or mitigate risks endemic to lethal injection. The history of botched executions and related problems detailed above plainly establish that lethal injection creates a risk of serious pain, thus raising a non-frivolous Eighth Amendment concern under *Baze*.⁴³⁹ Whether or not a particular state's procedure poses a *substantial* risk, of course, is a fact-dependent inquiry, but when lethal injection plaintiffs seek information bearing on that question, they do not seek to discover claims but rather evidence relevant to a claim they already assert. Indeed, as noted above, far from being extraordinary, the information they request should be available during the ordinary course of discovery.⁴⁴⁰

Third, states might argue that courts have no business interfering in a sensitive state function and imposing a judicial remedy. This argument undervalues the long-standing constitutional tradition, famously articulated in *Marbury v. Madison*, that the existence of a constitutional right presumes that some remedy must exist.⁴⁴¹ Denying inmates the right to important information about execution protocols denies them any opportunity to receive a remedy for an Eighth Amendment violation. Significantly, for the Eighth Amendment right to have any force, there must exist at least a possibility of a pre-execution remedy, such as an injunction prohibiting the state from using execution procedures creating too high a risk of pain.⁴⁴² Post-deprivation review does the inmate no good if he or she has already been executed. Moreover, if the inmate has, in fact, died an excruciating death, it is doubtful that any remedy can adequately compensate his family.⁴⁴³ Whereas tort law often presumes that damages can compensate the victim or his family,⁴⁴⁴ it is unlikely such a plaintiff could recover. State sovereign immunity prohibits monetary awards against the

⁴³⁹ See *supra* notes 66–81 and accompanying text.

⁴⁴⁰ See *supra* notes 206–239 and accompanying text.

⁴⁴¹ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23) (“[W]here there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.”); see also *Gen. Oil Co. v. Crain*, 209 U.S. 211, 228 (1908) (holding that a state court must provide a remedy for a constitutional violation); Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1209 (1988) (describing *General Oil* as holding “that a state court must give a remedy for constitutional rights violations, despite the state court’s lack of jurisdiction to award relief under state law”).

⁴⁴² See Berger, *supra* note 22, at 323–25 (discussing the availability of negative injunctions in lethal injection litigation).

⁴⁴³ These principles are at issue in pending actions in which Dennis McGuire and Clayton Lockett’s estates have sued Ohio and Oklahoma officials respectively for their botched executions. See generally Complaint, *McGuire v. Mohr*, No. 14-cv-00093 (S.D. Ohio Jan. 24, 2014) (estate suing state officials for botched execution); Complaint, *In re Lockett*, No. 14-cv-01119 (W.D. Ok. Oct. 13, 2014) (same).

⁴⁴⁴ See, e.g., 2 BLACKSTONE, *supra* note 441, at *438 (describing damages as “compensation for some injury sustained”); Heidi Li Feldman, *Harm and Money: Against the Insurance Theory of Torts*, 75 TEX. L. REV. 1567, 1577 (1997) (“Courts have traditionally stated the purpose of torts damages this way: to make the victim whole.”); Daniel Farber, *Basic Compensation for Victims of Climate Change*, 155 U. PA. L. REV. 1605, 1655 (2007) (providing examples of tort damages remedies).

state in the absence of a statute waiving such immunity, and qualified immunity quite possibly also blocks suits against state officials.⁴⁴⁵ Furthermore, because the inmate is deceased, he cannot testify to his pain. Even more to the point, the unlikely possibility that a deceased inmate's family could recover hardly offers adequate protection of the inmate's Eighth Amendment right.

It is true, of course, that the law does not always grant an injured plaintiff her preferred remedy,⁴⁴⁶ and immunity doctrines sometimes bar a remedy altogether.⁴⁴⁷ But although constitutional remedies are sometimes disappointing to civil rights plaintiffs, as Richard Fallon and Daniel Meltzer have explained, "[e]ffective remedies have always been available for most violations of legal rights, and of constitutional rights in particular,"⁴⁴⁸ especially where no immunity bar interferes.⁴⁴⁹ In the constitutional sphere, this remedy usually consists of an injunction. Because Eleventh Amendment immunity blocks retrospective monetary damages against the state,⁴⁵⁰ civil rights plaintiffs instead often seek prospective relief against state officers in the form of an *Ex Parte Young* action to enjoin those officials from violating the Constitution.⁴⁵¹

A *Young* action for injunctive relief is precisely the claim asserted by most individuals who fear that impending state action may violate their constitutional rights. Indeed, a condemned inmate's lethal injection action is, in essence, a *Young* suit for equitable relief, requesting the court to order the state to provide information about the execution procedure and enjoin the state from executing him with an unconstitutional procedure. Constitutional remedies

⁴⁴⁵ See U.S. CONST. amend. XI; *Edelman v. Jordan*, 415 U.S. 651, 664 (1974) (limiting civil rights plaintiffs to prospective, rather than retrospective, relief against state officers); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (holding that government officials performing discretionary functions are shielded from civil liability so long as their conduct "does not violate clearly established statutory or constitutional rights").

⁴⁴⁶ See, e.g., *Schweiker v. Chilicky*, 487 U.S. 412, 424–25 (1988) (holding that improper denial of disability benefits did not give rise to a claim for money damages); *United States v. Stanley*, 483 U.S. 669, 684 (1987) (rejecting availability of *Bivens* remedy); RICHARD H. FALLON ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 736–38 (6th ed. 2009) (describing the Supreme Court's retreat from *Bivens* damages remedies implied directly from the Constitution).

⁴⁴⁷ See Richard H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1780 (1991) ("[T]he structure of substantive, jurisdictional, and remedial doctrines that existed at the time of the Constitution's framing and that evolved through the nineteenth century by no means guaranteed effective redress for all invasions of legally protected rights and interests.").

⁴⁴⁸ *Id.* at 1786.

⁴⁴⁹ See *id.* (noting the line of official immunity and sovereign immunity cases that block remedies in constitutional cases).

⁴⁵⁰ See *Edelman*, 415 U.S. at 664.

⁴⁵¹ See *Ex Parte Young*, 209 U.S. 123, 145, 148 (1908); Walter Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1557 (1972); see also Fallon & Meltzer, *supra* note 447, at 1786–87 (discussing constitutional remedies).

may not offer everything that plaintiffs hope for, but, in lethal injection cases, the requested relief falls squarely within long-accepted judicial practices.

Finally, the states may point out that Congress, signaling its frustration with prison litigation, sought to limit prisoners' access to courts through the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Prison Litigation Reform Act (PLRA).⁴⁵² Neither of these statutes, however, prohibits inmates from receiving information about upcoming execution procedures. The Supreme Court has made clear that AEDPA's gatekeeping provisions, which bar successive habeas petitions,⁴⁵³ do not apply to lethal injection claims brought under 42 U.S.C. § 1983.⁴⁵⁴ The PLRA requires that prisoner plaintiffs exhaust their administrative remedies,⁴⁵⁵ but it rarely obstructs courts from reaching the merits in lethal injection cases,⁴⁵⁶ and, in any event, can be satisfied merely by seeking administrative relief prior to filing suit. Accordingly, neither statute undermines inmates' core due process right in lethal injection cases.

III. IMPLICATIONS

A. Protecting Against Dangerous Execution Procedures

These issues are hardly academic. On the contrary, protecting these due process norms would help make execution procedures safer in practice. When states operate behind a veil of secrecy, it is easier for them to cut corners and make mistakes that heighten the risk of pain.⁴⁵⁷ For example, when courts permit states to use compounded pentobarbital without any testing, they greatly increase the risk that the drug will be contaminated, ineffective, or otherwise flawed, thereby greatly increasing the risk of pain.⁴⁵⁸ Had a court required testing of South Dakota's compounded pentobarbital before Eric Robert's execution, it would have learned that it was contaminated and could have prevented

⁴⁵² See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 121; Prison Litigation Reform Act of 1996, Pub. L. No. 104-134, tit. VIII, 110 Stat. 1321.

⁴⁵³ See 28 U.S.C. § 2244(b)(1) (2012).

⁴⁵⁴ See *Hill v. McDonough*, 547 U.S. 573, 580 (2006); (holding that because a lethal injection claim does "not challenge the lethal injection sentence as a general matter but seeks instead only to enjoin the respondents from executing [plaintiff] in the manner they currently intend," it can be brought under 42 U.S.C. § 1983 and is therefore exempt from AEDPA's stringent gatekeeping provisions); *Nelson*, 541 U.S. at 647.

⁴⁵⁵ See 42 U.S.C. § 1997e(a)–(c)(1) (2000).

⁴⁵⁶ See, e.g., *Thorson v. Epps*, 701 F.3d 444, 445–46 (5th Cir. 2012) (noting that lethal injection plaintiff failed to exhaust state administrative remedies pursuant to the PLRA but reaching the merits anyway).

⁴⁵⁷ See *Denno*, *supra* note 17, at 48; *Berger*, *supra* note 22, at 326; *Berger*, *supra* note 142, at 61.

⁴⁵⁸ See *supra* notes 103–121 and accompanying text.

his botched execution.⁴⁵⁹ Testing also would probably have identified problems with Oklahoma's compounded pentobarbital, which likely caused problems with Michael Lee Wilson's execution.⁴⁶⁰

Similarly, when courts permit states to conceal details about the credentials, training, and abilities of their execution team members, they heighten the risk that members will be unqualified and make grave mistakes. For instance, without access to important information about execution team members, it is impossible for inmates to learn that the person responsible for mixing the anesthetic is dyslexic and mixing the wrong amount, as occurred in Missouri for several years.⁴⁶¹ Greater scrutiny of team member qualifications also helps inmates recognize whether state officials understand the drugs in question. For example, during the botched execution of Joseph Wood, Arizona injected fifteen times the standard dose of its drug.⁴⁶² As one professor of anesthesiology remarked afterwards, "[t]hey're making this up as they go along."⁴⁶³

Disclosure of procedure details can also help inmates discern whether the person charged with inserting the catheter into the inmate's veins is qualified to do so.⁴⁶⁴ Faulty catheter insertions largely contributed to the grisly deaths of Angel Diaz in Florida and Clayton Lockett in Oklahoma.⁴⁶⁵ As noted above, Oklahoma's protocol offered inadequate details about the qualifications and training of the person inserting the IV line,⁴⁶⁶ and clearly the person tasked with that job for Lockett's execution did it badly. A preliminary autopsy report found that Mr. Lockett's veins had been in "excellent condition," but that the execution team had nonetheless made numerous failed attempts to set the IV before finally setting it improperly and ineffectively.⁴⁶⁷ And Oklahoma at least requires *some* training for setting the IV line. By contrast, other states provide either no or vague requirements for who may insert the catheter.⁴⁶⁸ Indeed,

⁴⁵⁹ See *supra* notes 119–120 and accompanying text.

⁴⁶⁰ See *supra* notes 117–118 and accompanying text.

⁴⁶¹ See Berger, *supra* note 22, at 269 (discussing Missouri doctor's problems with mixing).

⁴⁶² See Fernanda Santos, *Executed Arizona Inmate Got Fifteen Times Standard Dose, Lawyers Say*, N.Y. TIMES, Aug. 1, 2014, http://www.nytimes.com/2014/08/02/us/executed-arizona-man-given-15-times-standard-dose-lawyers-say.html?_r=0, archived at <http://perma.cc/5US4-5M88>; *supra* note 136 and accompanying text.

⁴⁶³ Santos, *supra* note 462 (quoting Dr. Joel Zivot, Assistant Professor of Anesthesiology and Surgery at Emory University Hospital).

⁴⁶⁴ See Berger, *supra* note 40, at 2065–67.

⁴⁶⁵ See LOCKETT EXECUTION REPORT, *supra* note 159, at 14 ("the viability of the IV access point was the single greatest factor that contributed" to the botched execution); *supra* notes 63–64 and accompanying text.

⁴⁶⁶ See *supra* note 169 and accompanying text.

⁴⁶⁷ See LOCKETT EXECUTION REPORT, *supra* note 159, at 15–17.

⁴⁶⁸ See, e.g., MISS. DEP'T OF CORR., CAPITAL PUNISHMENT PROCEDURES, (2011), archived at <http://perma.cc/UB9V-7STJ?type=pdf> (stating that "[c]atheters are placed in each arm" without specifying who places the catheters); GA. DEP'T OF CORR., LETHAL INJECTION PROCEDURES, July 17,

even states that have had problems setting the IV line do not always immediately revise their protocol to specify the credentials of the person charged with performing that task. For instance, the protocol Florida adopted *after* the botched Diaz execution merely stated that “a designated member of the execution team” will insert the IV lines.⁴⁶⁹

Disclosure of execution team member qualifications can also indicate whether the state has identified a competent person to assess the inmate’s anesthetic depth. Assessing anesthetic depth is especially important in states using the three-drug protocol because the second and third drugs are excruciating if the inmate is not properly anesthetized.⁴⁷⁰ Again, the Lockett execution is instructive. Though the Oklahoma protocol does state that a “physician . . . monitor the condemned offender’s level of consciousness,”⁴⁷¹ it does not specify whether that physician must be trained in anesthesiology. Most non-anesthesiologist doctors are not trained to monitor anesthetic depth,⁴⁷² and it became horrifyingly evident after Lockett’s execution that not every doctor is capable of doing so correctly. Indeed, Oklahoma’s physician mistakenly deemed Lockett to be fully unconscious when he was not.⁴⁷³

Disclosure of execution team contingency plans would also help. For example, after repeated attempts to insert the catheter into various veins, Oklahoma officials finally tried to access Lockett’s femoral vein. However, officials could not locate a catheter of the proper size for femoral access.⁴⁷⁴ Nevertheless, the physician used the catheter available, even though he had never before attempted femoral access with such a short one.⁴⁷⁵ Had Oklahoma been forced to disclose a contingency plan, it would have had to write one, and it may have anticipated this problem and provided its team with the necessary equipment to

2012, *archived at* <http://perma.cc/G5LZ-G9FT?type=pdf> (noting that the “IV Team will provide two (2) intravenous accesses into the condemned” but failing to specify credentials of IV team beyond the requirement it must consist of two or more “trained persons, including at least one (1) Nurse”).

⁴⁶⁹ See FLA DEP’T OF CORR., EXECUTION PROTOCOL 6 (2007), *archived at* <http://perma.cc/M28L-8D8T?type=pdf>. Florida has since changed protocols several times. See, e.g., FLA. DEP’T OF CORR., EXECUTION BY LETHAL INJECTION PROCEDURES 2 (2013), *archived at* <http://perma.cc/M28L-8D8T?type=pdf> (requiring that venous access be achieved by person from one of several classes of credentials).

⁴⁷⁰ See Berger, *supra* note 22, at 271.

⁴⁷¹ See OKLAHOMA PROTOCOL, *supra* note 164, at 16.

⁴⁷² Transcript of Trial at 71, Taylor v. Crawford, No. 05-4173, 2006 WL 1236660 (expert anesthesiologist explaining that monitoring of anesthetic depth must be done by anesthesiologists).

⁴⁷³ See LOCKETT EXECUTION REPORT, *supra* note 159, at 18 (noting “the physician determined that Lockett was unconscious” but subsequently “Lockett began to move and the physician recognized there was a problem”).

⁴⁷⁴ See *id.* at 16 (noting that attempts to find a “needle/catheter” between one and three-quarter inches and two and a half inches failed and that the largest available was only one and a quarter inches).

⁴⁷⁵ See *id.*

attempt femoral access. Relatedly, greater disclosure of the State's contingency plans (or lack thereof) could also have enabled Lockett's lawyers to highlight that Oklahoma had an inadequate plan for the execution if the initial attempts to set the catheter failed. Put simply, greater transparency would help lawyers and judges discover the states' shortcomings *before* botched executions.

Even greater visibility during the execution itself could help prevent botched executions. During Lockett's execution, Oklahoma concealed the catheter site with a sheet.⁴⁷⁶ Had the catheter access point been visible during the drug administration, the execution team would have been much more likely to discover the infiltration and prevent or mitigate an excruciating execution.⁴⁷⁷

Finally, greater transparency may also encourage states to do a better job following their own protocols. States sometimes abandon their own procedures during executions, thus heightening the risk of mistakes.⁴⁷⁸ For example, Arizona has deviated from its plans several times, including during the botched Wood execution.⁴⁷⁹ Missouri for many years also made haphazard changes to its procedure without telling anyone.⁴⁸⁰ Similarly, a federal district judge hearing a challenge to the Ohio procedure noted that, "Ohio pays lip service to standards it then often ignores without valid reasons, sometimes with no physical ramification and sometimes with what have been described as messy if not botched executions."⁴⁸¹

It is no coincidence that a state like Oklahoma, which prizes lethal injection secrecy so much that it threatened to defy its own State Supreme Court on the matter, botched two executions in the first four months of 2014. Of course, greater disclosure will not guarantee safe executions, but it would help inform inmates of the dangers presented by different lethal injection procedures. This information, in turn, would help inmates' lawyers explain those dangers to courts, thus helping protect inmates' Eighth Amendment rights.

⁴⁷⁶ See *supra* notes 158–160 and accompanying text.

⁴⁷⁷ See LOCKETT EXECUTION REPORT, *supra* note 159, at 18.

⁴⁷⁸ See Fernanda Santos & John Schwartz, *Arizona Loose with Its Rules in Executions, Records Show*, N.Y. TIMES, Aug. 17, 2014, <http://www.nytimes.com/2014/08/18/us/arizona-loose-with-its-rules-in-executions-records-show.html?hp&action=click&pgtype=Homepage&version=HpHeadline&module=second-column-region®ion=top-news&WT.nav=top-news>, archived at <http://perma.cc/KYF4-FJMB?type=pdf> (noting several instances in which Arizona failed to follow its own execution procedures).

⁴⁷⁹ See *id.*

⁴⁸⁰ See *Taylor*, 2006 WL 1779035, at *7 (“[One defendant] also testified that he felt that he had the authority to change or modify the formula as he saw fit. It is apparent that he has changed and modified the protocol on several occasions in the past.”).

⁴⁸¹ *Cooley v. Kasich*, 801 F. Supp. 2d. 623, 654–55 (S.D. Ohio 2011).

Along similar lines, states are more likely to take proper precautions when they know there will be external scrutiny of their actions.⁴⁸² States today know their execution procedures will receive, at most, minimum external scrutiny, and they often make mistakes. Greater transparency would also allow states to get more external input from scientists and other experts to provide suggestions that may help make executions safer.⁴⁸³ Such precautions and external advice themselves would likely decrease the risk of botched executions.⁴⁸⁴ In short, the connection between transparency and safety is very real.⁴⁸⁵

B. Protecting Due Process and Discouraging Political Process Failures

In addition to heightening the risk of excruciating executions, state secrecy violates core constitutional and democratic norms. Rather than embracing transparency and sunshine, states cower in secrecy. For their part, courts have been complicit, largely abdicating their duty to uphold the Constitution. The most dramatic example, perhaps, was the Oklahoma Supreme Court, which, after courageously halting upcoming executions, may have bowed to political pressure and permitted the State to proceed, resulting in Lockett's horribly botched execution.⁴⁸⁶ Though federal courts are insulated from such direct political pressure,⁴⁸⁷ they too have been mostly unwilling to obstruct executions and anger public officials.⁴⁸⁸ Although courts are understandably sensitive to states' concerns, their refusal to examine secret state procedures effectively bestows the judiciary's blessing on bad government practices.⁴⁸⁹

From this perspective, method of execution cases are just as much about fair process and good governance as they are about cruel and unusual punish-

⁴⁸² See Berger, *supra* note 142, at 61 (“[S]tates concealing their procedures are more likely to cut corners and make mistakes than if their procedures are in plain view.”).

⁴⁸³ Of course, some scientists may be unwilling to help the states in this regard, but some may. Indeed, even doctors can and do participate in lethal injection executions. See Alper, *supra* note 354, at 19–49.

⁴⁸⁴ Cf. *Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868, 883 (9th Cir. 2002) (arguing that without a right to view an execution procedure, “the public will be forced to rely on the same prison officials who are responsible for administering the execution to disclose and provide information about any difficulties with the procedure”).

⁴⁸⁵ See Megan McCracken & Jennifer Moreno, *Secret Drugs, Agonizing Deaths*, N.Y. TIMES, Apr. 13, 2014, http://www.nytimes.com/2014/04/14/opinion/secret-drugs-agonizing-deaths.html?_r=0, archived at <http://perma.cc/NNB5-WMKT> (“If prison officials conceal crucial information from judges, lawyers and the public, we have only their word that the drugs will cause death in a manner that complies with the Constitution.”).

⁴⁸⁶ See *supra* notes 153–160 and accompanying text.

⁴⁸⁷ See U.S. CONST. art. III, § 1 (providing life tenure and salary protection for federal judges).

⁴⁸⁸ See *supra* notes 175–205 and accompanying text.

⁴⁸⁹ See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980) (plurality opinion) (“Without publicity, all other checks [on state action] are insufficient.”).

ment. Departments of corrections have designed and implemented lethal injection procedures without oversight, transparency, and, often, expertise.⁴⁹⁰ Courts, nevertheless, usually defer to the states in these cases,⁴⁹¹ even though the states are wholly undeserving of such deference.⁴⁹²

Indeed, courts' frequent dismissal of lethal injection cases is especially disturbing precisely because many states have demonstrated that they should not be trusted with these matters. Missouri's track record over the past decade is symptomatic of a larger nationwide problem. When Missouri still used the three-drug protocol, it instructed its executioners to inject the drugs as quickly as possible, mistakenly believing that thiopental renders a person fully unconscious within fifteen seconds.⁴⁹³ During this same period, it entrusted its procedure to a doctor, who lowered the amount of anesthetic and made other changes to the procedure without informing correctional authorities.⁴⁹⁴ This doctor later admitted to being dyslexic, conceding that he had no idea how much anesthetic he was preparing.⁴⁹⁵ Further exacerbating these problems, Missouri delegated "total discretion" over its procedure to this doctor⁴⁹⁶ and adopted no contingency plans to deal with problems that arose during executions. These problems created a very serious risk that Missouri was failing to anesthetize its inmates before injecting them with excruciating drugs,⁴⁹⁷ but the State further failed to monitor its inmates' anesthetic depth to ensure that they were properly anesthetized.⁴⁹⁸ To top it all off, the State vigorously resisted all efforts to inquire into its execution methods.⁴⁹⁹

Though the State's ultimate decision to abandon the three-drug protocol in May 2012 was encouraging, its more recent actions inspire no more confidence. Missouri has changed its execution protocol numerous times since May 2012, including five times between August 1, 2013 and November 20, 2013.⁵⁰⁰

⁴⁹⁰ See Berger, *supra* note 40, at 2082–84.

⁴⁹¹ See *supra* notes 175–205 and accompanying text.

⁴⁹² See *Baze v. Rees*, 553 U.S. 35, 75 (2008) (Stevens, J. concurring).

⁴⁹³ See Dep. of Larry Crawford, at 129–31, *Taylor*, No. 05-4173, 2006 WL 1779035 (containing explanation by DOC Director that drugs are injected in rapid succession).

⁴⁹⁴ *Taylor*, 2006 WL 1779035, at *7; Doe Deposition, *supra* note 62, at 96.

⁴⁹⁵ *Taylor*, 2006 WL 1779035, at *7 (“[One defendant] also testified that he felt that he had the authority to change or modify the formula as he saw fit. It is apparent that he has changed and modified the protocol on several occasions in the past.”); Doe Deposition, *supra* note 62, at 25 (“I am dyslexic and so . . . it’s not unusual for me to make mistakes.”).

⁴⁹⁶ *Taylor*, 2006 WL 1779035, at *7–8.

⁴⁹⁷ *Id.* at *8.

⁴⁹⁸ See Transcript of Trial at 71, *Taylor*, No. 05-4173, 2006 WL 1236660.

⁴⁹⁹ See, e.g., Defendant’s Sept. 11, 2007 Responses to Plaintiffs’ Interrogatories, *Clemons v. Crawford*, No. 07-4129 (W.D. Mo. May 1, 2008); Berger, *supra* note 22, at 305.

⁵⁰⁰ See *Nicklasson v. Lombardi*, No. 13-3664, slip op. at 12 (8th Cir. Dec. 23, 2013) (Bye, J., dissenting) (disagreeing with denial of petition for rehearing en banc and denial of motion to stay execution).

In some instances, the State has made changes less than a week before an execution.⁵⁰¹ All the while, Missouri has resisted inquiries into its ever-changing plans, even though ample safety concerns abound. For example, Missouri has conducted several executions using untested compounded pentobarbital, despite evidence of its dangers and problematic executions using the drug.⁵⁰²

Perhaps most horrifyingly, as Judge Bye recounted in a recent dissent, “Missouri has a well-documented history of attempting to execute death row inmates before the federal courts can determine the constitutionality of the executions.”⁵⁰³ For example, Missouri executed Allen Nicklasson on December 11, 2013 before the federal courts had completed review of his constitutional challenges to the State’s newly adopted procedure.⁵⁰⁴ Nevertheless, despite this history, trial courts and the Eighth Circuit routinely permit it to continue executions with nary a glance at its practices.⁵⁰⁵ And that is just Missouri. Other states’ records are similarly suspect.⁵⁰⁶

As noted above, courts’ repeated willingness to turn a blind eye to problematic state practices is likely driven by a variety of concerns, most fundamentally an unwillingness to interfere with the states’ administration of their death-penalty system.⁵⁰⁷ But in prioritizing these concerns, courts effectively let bad governmental practices fester, essentially sending states the message to go ahead and get away with what they can. All Americans have an interest in knowing whether the government is doing its job competently and constitutionally.⁵⁰⁸ Without serious judicial review of the government’s actions, executive agencies like departments of correction can easily abuse their power behind closed doors.⁵⁰⁹ In this and other areas, governments have a tendency to

⁵⁰¹ See *Taylor v. Bowersox*, 14-1403, slip op. at 3 (8th Cir. Feb. 25, 2014) (Bye, J., dissenting).

⁵⁰² See *supra* notes 4–16, 145–146 and accompanying text.

⁵⁰³ See *Nicklasson*, No. 13-3664, slip op. at 2–4 (Bye, J., dissenting).

⁵⁰⁴ See *Bowersox*, No. 14-1403, slip op. at 3; *Zink v. Lombardi*, No. 13-3664, slip op. at 2 (8th Cir. Dec. 23, 2013) (Bye, J., dissenting); Andrew Cohen, *Missouri Executed This Man While His Appeal Was Pending in Court*, ATLANTIC (Feb. 1, 2014), <http://www.theatlantic.com/national/archive/2014/02/missouri-executed-this-man-while-his-appeal-was-pending-in-court/283494/>, archived at <http://perma.cc/RZ88-2J2G>.

⁵⁰⁵ See *Taylor v. Crawford*, 487 F.3d 1087, 1085 (8th Cir. 2007); *Bowersox*, No. 14-1403, slip op. at 2 (8th Cir. Feb. 25, 2014).

⁵⁰⁶ See, e.g., Denno, *supra* note 17, at 1339–45.

⁵⁰⁷ See *supra* 356–419 and accompanying text.

⁵⁰⁸ Cf. *N.Y. Times Co. v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring) (“In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in . . . [certain areas] may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government.”).

⁵⁰⁹ Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 168 (2006).

over-classify, treating far more material as “secret” than necessary.⁵¹⁰ If courts do not carefully scrutinize this purported need for secrecy, then nobody will. The judiciary’s collective willingness to bless even the most secretive, sketchy state procedures, then, should concern not only death penalty opponents but all of us.

We are used to thinking of capital defendants and death-row inmates enjoying some procedural protections not available to other criminal defendants and convicted felons.⁵¹¹ Perhaps because of these protections, some judges seem to think capital inmates have had more than their share of days in court and treat lethal injection claims as undeserving of further judicial scrutiny. Whether or not this impatience with capital litigation generally is well founded, it may encourage some judges to abandon their duty to impartial constitutional norms in these cases. It is hard to think of another set of cases in which the state government has announced its intent to harm individuals, who therefore bring § 1983 claims to protect a previously recognized constitutional right, only to be consistently told that they are entitled to absolutely no discovery shedding light on their claims, even though the state possesses all information pertinent to their claims and no immunity doctrine bars their actions.⁵¹² It is similarly hard to think of a set of cases that so many courts reflexively treat as frivolous, despite so many well-publicized incidents suggesting otherwise.⁵¹³

Of course, certain governmental interests, such as national security, sometimes justify secrecy.⁵¹⁴ Even in that context, however, courts have found that the individual’s need for information weighs heavily in the judicial balanc-

⁵¹⁰ See *id.* at 169 (noting that the government has a tendency to overclassify with special attention to the national security context).

⁵¹¹ See Carol S. Steiker & Jordan M. Steiker, *Part II: Report to ALI Concerning Capital Punishment*, 89 TEX. L. REV. 367, 419 (2010) (“As difficult as it is for death-sentenced inmates to navigate AEDPA’s procedural maze, the burdens on non-capital inmates are virtually insurmountable.”); Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 605 (2005) (“As a procedural matter, non-capital inmates have fewer avenues and resources for vindicating their claims of innocence.”).

⁵¹² Cf. *Landrigan v. Brewer*, No. 10–02246, 2010 WL 4269559, at *9 (D. Ariz. Oct. 25, 2010) (“This Court has never experienced a situation such as this where a defendant opposes a motion for emergency relief by claiming it has the evidence necessary for resolution of the matter but that evidence should not be produced.”).

⁵¹³ See *supra* notes 62–64, 117–138 and accompanying text.

⁵¹⁴ See Richard Moberly, *Whistleblowers and the Obama Presidency: The National Security Dilemma*, 16 EMP. RTS. & EMP. POL’Y J. 51, 111–40 (2012) (arguing that national security does sometimes justify governmental secrecy but suggesting reforms that could better balance security and transparency).

ing.⁵¹⁵ States have no comparable interest in lethal injection cases, and yet courts often treat their interest in concealing their execution procedures as *more* sensitive than cases involving acutely sensitive matters like terrorism and national security.⁵¹⁶ Moreover, to the extent that states arguably have legitimate reasons to keep secret some material pertaining to lethal injection, those interests can be accommodated while still granting plaintiffs access to information vital to their claims.⁵¹⁷

To this extent, courts should recognize that these cases are about much more than lethal injection. Indeed, they implicate the most fundamental norms of fair process and transparent, democratically accountable government.⁵¹⁸ In deferring to even the most egregious state secrecy and suspicious or ill-conceived state practices, courts offer deference to state governmental practices that least deserve it.⁵¹⁹ They also ignore core due process principles, denying inmates their right to a fair hearing, because such a hearing interferes with the majority's calls that justice be done. Courts may think they are doing the right thing when they refuse to let inmates postpone their executions to inquire into lethal injection procedures, but by denying them fair process, they violate basic constitutional norms.

CONCLUSION

Despite a series of botched executions, federal and state courts often deny death row inmates' requests to know crucial information about the method by which they will be executed. In so doing, they deny the inmates' fundamental due process right to information, which is vital to protecting the inmate's Eighth Amendment rights. Without access to important information about a state's planned execution procedures, inmates have no way to protect themselves against an execution creating a substantial risk of serious pain. The U.S. Supreme Court has recognized analogous rights to information that help individuals protect other substantive rights, and courts should do so here.

By permitting states to execute inmates without disclosing key details about their lethal injection procedures, courts are not only denying inmates

⁵¹⁵ See *United States v. Moussaoui*, 382 F.3d 453, 471–76 (4th Cir. 2004) (balancing in favor of the individual and ordering the government to produce information).

⁵¹⁶ Compare *id.* (ordering the government to produce information on its execution protocols), with *Bowersox*, No. 14-1403, slip op. at 2 (affirming the district court's denial of the petitioner's motion for stay of execution without requiring the government to produce information on its execution procedures), and *Zink v. Lombardi*, No. 12-04209-CV-C-BP, slip op. at 2–3 (W.D. Mo. Feb. 24, 2014).

⁵¹⁷ See *supra* notes 356–419 and accompanying text.

⁵¹⁸ See *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936) (“[I]nformed public opinion is the most potent of all restraints upon misgovernment.”).

⁵¹⁹ See *Berger*, *supra* note 142, at 52–55; *Berger*, *supra* note 40, 2061–67.

their Eighth Amendment due process rights but are also implicitly blessing states' secretive and often unprofessional administration of their most solemn task. Courts have barely glanced at states' recent turn to compounded drugs, despite evidence that such chemicals pose serious dangers and have, in fact, resulted in torturous executions. Courts similarly routinely refuse to inquire into three-drug procedures, even though it is undisputed that those procedures cause excruciating pain if administered improperly. Perhaps a more thorough inquiry into these matters would vindicate some states' methods, but both states and courts have resisted such inquiries. In this way, courts effectively permit states to do what they want, thereby exacerbating the risk that their execution methods will cause excruciating pain.

Courts and states' concern that litigation will impede capital punishment is understandable, but it is also overstated. Courts can fashion procedures that minimize the costs to states while simultaneously permitting inmates to review execution procedures. By denying review altogether, however, courts are denying inmates' core constitutional rights and allowing bad governmental practices to continue.

